Supreme Court, U.S.
FILED

(1)

02-1402 MAR 20 2003
No.
IN THE OFFICE OF THE CLERK

Supreme Court of the United States

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION; JOHN M. QUAIN, CHAIRMAN; ROBERT K. BLOOM, VICE CHAIRMAN; NORA MEAD BROWNELL, COMMISSIONER; AARON WILSON, JR., COMMISSIONER; TERRENCE J. FITZPATRICK, COMMISSIONER;,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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106 pp

QUESTIONS PRESENTED

The questions presented are:

1) Whether it is an unconstitutional deprivation of the Pennsylvania Public Utility Commission's (PA PUC's) right to claim the Eleventh Amendment defense of sovereign immunity from suit, where a District Court's denial of immunity in a prior unrelated case brought by Amtrak is afforded preclusive effect in subsequent suits brought by Amtrak?

2) Whether the Eleventh Amendment's limitation on the federal courts' judicial power is exceeded, where that power is exercised to allow suits against the state, by affording preclusive effect to a District Court's denial of immunity in a prior unrelated case, and absent a finding that either, 1) there has been a valid congressional abrogation of state sovereignty, or 2) the state voluntarily consented to suit or otherwise waived sovereign immunity?

LIST OF PARTIES

The parties to this proceeding are The Pennsylvania Public Utility Commission (PA PUC or Commission) and the PA PUC's Commissioners John M. Quain, Robert K. Bloom, Nora Mead Brownell, Aaron Wilson, and Terrance J. Fitzpatrick named in their individual capacity, Norfolk Southern Railway Company and CSX Transportation, Inc., and the National Railroad Passenger Corp. (Amtrak).

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No.

In the Supreme Court of the United States

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

The Petitioner Commonwealth of Pennsylvania Public Utility Commission respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Third Circuit entered in the above-entitled proceeding on May 1, 2002.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reprinted in the appendix hereto. (App., *infra.* 1a- 24a). The opinion of the District Court for Eastern

District of Pennsylvania is reprinted in the appendix hereto. (App., *infra*. 25a-44a)

JURISDICTION

On May 1, 2002, the Court of Appeals for the Third Circuit affirmed the order of the District Court. The Commission timely petitioned for reconsideration and the reconsideration was denied by order dated November 22, 2002 (App., *infra*. 75a- 76a). The Commission petitioned this Court for extension of time in which to petition for Writ of Certiorari, which was granted up to and including March 20, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (l).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

U.S. Const. amend. XI.

STATEMENT OF THE CASE

This case presents important and recurring questions pertaining to the limitation of the federal courts' judicial power under the Eleventh Amendment of the United States Constitution to permit suits against the states. In this case, the Third Circuit exercised its judicial power to allow any suit brought by Amtrak against the Commonwealth of Pennsylvania Public Utility Commission (PA PUC or Commission). The Third Circuit affirmed the District Court's application of the judge-made doctrine of collateral estoppel to forever bar the state's claim of immunity in any suit brought by Amtrak, based upon a denial of that immunity in a prior unrelated case, and absent a finding of 1) valid Congressional abrogation of sovereignty, or 2) the state's consent to suit or otherwise waiver of the immunity defense.

The District Court's denial of immunity in the prior unrelated case was based upon a finding that the proof offered by the PA PUC was insufficient to establish entitlement to the defense, and did not rest on a finding of either of the two instances in which this Court has held suits may be brought against the state: 1) valid Congressional abrogation, or 2) state's consent to suit or voluntary waiver of sovereign-immunity.

A. Prior unrelated action brought by Amtrak

The prior unrelated case upon which the District Court, and now the Third Circuit, bases its determination that the PA PUC's defense of sovereign immunity is forever barred against Amtrak by application of collateral estoppel is *National Railroad Passenger Corp. v. Com. of Pennsylvania Public*

Utility Commission, 1997 WL 597963 (E.D. Pa. Sep. 15, 1997). (A-129) (App., *infra*. 45a - 76a).

In that case, Amtrak brought suit in federal court to claim it was exempt from the PA PUC's power to allocate and assess costs for repair and maintenance of bridges located in the Commonwealth. The PA PUC raised the affirmative defense of Eleventh Amendment sovereign immunity and moved to dissolve the existing injunction which barred the PA PUC from assessing Amtrak costs with respect to one bridge within the Commonwealth. The PA PUC asserted that pursuant to the holding of this Court in *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996), Amtrak's claimed exemptions must fail since Amtrak's enabling legislation constitutes an invalid attempt by Congress to abrogate state sovereignty pursuant to the commerce clause.

In the context of resolving the PA PUC's motion to dismiss, the District Court determined, based upon the motion and the attached supporting documentation, that the PA PUC had failed its burden of proof with respect to its immunity by virtue of one sub-prong of the three-pronged test in *Christy v. Pa. Turnpike Comm'n*, 54 F.3d 1140 (3d Cir. 1995) (A-148) (*Christy*)[1], declined

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[1] The *Christy* test examines: (1) whether in the event the plaintiff prevails, the payment of the judgment would come from the state (this includes three sub-prongs: (a) whether the payment will come from the state's treasury, (b) whether the agency has sufficient funds to satisfy the judgment, and (c) whether the sovereign has immunized itself from responsibility for the agency's debts); (2) the status of the agency under state law; and (3) what degree of autonomy the agency enjoys. *Christy*, 54 F.3d at 1144-45. In the case relied upon by the District Court, the Court had concluded that the PA PUC had not proven that the payment would come from the state's treasury and held that failure of that one sub prong outweighed the remainder of the test, even though the case was for

to address as unnecessary the question of the application of *Seminole Tribe*, and denied the PA PUC's motion to dissolve the injunction.

B. Current action brought by Amtrak

The current action before the District Court, underlying the Third Circuit's opinion, is a new action brought by Amtrak contending that it is exempt from PA PUC jurisdiction to enforce safety regulations requiring minimum side clearance for railroad tracks which exist on property owned by Amtrak. Amtrak claims that state jurisdiction of such safety regulations is preempted by the Rail Passenger Service Act, 49 U.S.C. § 24902(j) (Amtrak exempt from state or local building, zoning, subdivision or similar or related laws).

Before the District Court, the PA PUC and the Freight Railroads filed independent Motions to Dismiss the Amtrak Complaint. The PA PUC's motion was based, in part, on its claim of sovereign immunity. The District Court applied the doctrine of collateral estoppel to preclude the PA PUC's claim of sovereign immunity based upon that court's prior denial of immunity in the unrelated case also brought by Amtrak, and issued its Memorandum denying both Motions to Dismiss on May 10, 2001. (App., *infra*. 25a- 44a)

C. PA PUC's Appeal to the Third Circuit

Having been precluded from raising the Eleventh Amendment claim of sovereign immunity and denied the opportunity to present evidence or legal argument on the issue before the District Court, the PA PUC sought

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declaratory and injunctive relief and involved no monetary judgment at all.

immediate appeal by the Third Circuit pursuant to *Cohen v. Beneficial_Industrial Loan Corp.*, 337 U.S. 541(1949), and *Puerto Rico Aqueduct & Sewer Auth. V. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). The Third Circuit accepted jurisdiction of the appeal and ultimately affirmed the District Court's application of collateral estoppel to bar the PA PUC's claim of sovereign immunity as to Amtrak, based on a denial of the immunity defense in a prior unrelated matter.

D. The Court of Appeals' Decision

The Third Circuit held that the PA PUC is forever barred from raising its claim of Eleventh Amendment sovereign immunity from suit in federal court in any case brought by Amtrak, by application of the judge-made doctrine of collateral estoppel to bar the defense. The court declined to apply the exception to that rule for "unmixed questions of law," and perceived no reason to give special consideration to the fact that the issue to be precluded was a state's Eleventh Amendment right to claim immunity. As a result, the appellate court affirmed the District Court's decision that the PA PUC is forever barred from raising and offering evidence to support its Eleventh Amendment right to immunity from suit in cases brought by Amtrak, because the PA PUC had failed to carry its burden of proof on that issue in a prior unrelated matter also brought by Amtrak.

REASONS FOR GRANTING THE WRIT

The Third Circuit's misapplication of the doctrine of collateral estoppel and its exceptions, as they pertain to a state's Eleventh Amendment claim of sovereign immunity, demonstrates the appellate court's profound misunderstanding of both the constitutional character of

the immunity defense and the limits of the federal court's judicial power to allow suits against the states, as set forth in the Eleventh Amendment.

In the absence of finding either, 1) a valid Congressional abrogation of sovereignty, or 2) a state's consent to suit or waiver of immunity, the Third Circuit erroneously exercises its judicial power to forever deprive the PA PUC of the ability to even raise the claim of its right to Eleventh Amendment protection as to Amtrak, and thus strips the PA PUC of the immunity shield's essential protection and fundamental voluntary nature. Thus, the Third Circuit opinion exceeds the limits of a federal court's judicial power under the Eleventh Amendment and it must be reversed.

In this case, the Third Circuit's refusal to allow the PA PUC to raise the affirmative defense of sovereign immunity was error. Any past failure to meet its burden of proof on a sovereign immunity claim does not forever bar the PA PUC from raising the claim in future, non-related actions.

Only the instruction of this Court can dispel the Third Circuit's profound misapprehension of the application of the doctrine of collateral estoppel and the exceptions thereto as they apply to a state's claim of Eleventh Amendment sovereign immunity. Only the action of this Court can reign in the Third Circuit's errant exercise of judicial power to comport with the limits placed upon it by the Eleventh Amendment. The opinion of the Third Circuit has serious legal and practical consequences of far-reaching effect and should be reviewed by this Court.

I. The opinion of the Third Circuit intolerably conflicts with the Eleventh Amendment's limit of the federal court's judicial power to allow suits against the state

The opinion of the Third Circuit results in an impermissible broadening of the circumstances under which a state may be sued.

This Court has recognized only two instances in which a state may be sued. This Court has expressly stated that:

> While this immunity from suit is not absolute, we have recognized only two circumstances in which an individual may sue a State. First, Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment – an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance. Second, a State may waive its sovereign immunity by consenting to suit.

College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (citations omitted).

Thus, deprivation of the Eleventh Amendment sovereign immunity defense must be based upon finding of either 1) valid Congressional abrogation, or 2) voluntary waiver/consent to suit.

The present case falls under neither of the two circumstances recognized by this Court in which the state may be sued. There is no finding that the PA PUC

has waived its immunity or consented to suit, and the question, whether a valid Congressional abrogation of immunity has occurred in the circumstances, was not considered.

A finding of consent/waiver or valid abrogation of immunity is pivotal to the federal court's authority to deny an Eleventh Amendment claim. This Court's analysis of whether a state may be precluded from raising immunity in subsequent-related proceedings illustrates this point *See, generally; Montana, v. United States*, 440 U.S. 147(1979). *See, also, Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613, 615 (2002) (discussion of general principle that sovereign immunity defense precluded by virtue of state's waiver or consent in an action).

The Third Circuit apparently failed to see the relevance of the line of cases in which this Court considered the application of estoppel to bar the Eleventh Amendment defense based upon a finding of waiver or consent. The holdings in these cases clearly require that the deprivation of immunity must occur in the context of waiver/ consent or valid abrogation.

Further, the Third Circuit opinion fails to respect the principle that a states' waiver, of found at all, must be voluntary. *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. at 616 (noting that state remains free to waive its Eleventh Amendment immunity). If the defense of sovereign immunity may be precluded on the basis that a party has failed to carry its burden of proof on that claim in a prior unrelated proceeding, the voluntary nature of the defense is destroyed.

In the present case, the Third Circuit affords preclusive effect to the denial of immunity in the prior case. The denial in the prior case was based upon the District Court's determination on the burden of proof question under *Christy*, whether the PA PUC provided sufficient proof of entitlement to the defense. By affording preclusive effect to denial of immunity based on insufficient offer of proof, the Third Circuit effectively bars the PA PUC any opportunity to offer additional proof to support the immunity claim in future suits brought by Amtrak.

Thus, as a practical matter, if preclusive effect may be afforded to a prior denial of immunity in an unrelated case, a state must now offer any and all proof on the issue of immunity when it is initially raised against any party, or be at risk of forever losing the right to raise it against that party. Thus, the Third Circuit opinion strips the defense of its "voluntary" nature.

Third Circuit's order creates a new circumstance under which a state may be sued: where sovereign immunity claim is precluded by application of collateral estoppel, based on denial of immunity in a prior unrelated matter. This result is in direct conflict with the rule in *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, that suits may be brought against the state only in cases where either, 1) waiver/consent, or 2) valid abrogation, has occurred.

The Third Circuit' s application of collateral estoppel to bar the defense of immunity in a subsequent unrelated matter absent either, 1) state consent to suit or waiver, or 2) valid Congressional abrogation, is a marked departure from the accepted exercise of judicial power pursuant to the Eleventh Amendment and the holdings of this Court and can not be permitted.

II. The Third Circuit's application of collateral estoppel to bar the claim of sovereign immunity in a subsequent unrelated matter intolerably conflicts with the principles underlying the holdings of this Court regarding sovereign immunity, the doctrine of collateral estoppel, and the "unmixed question questions of law" exception to application of that doctrine

In its approach to the question of whether to forever bar a state's claim of sovereign immunity by application of the doctrine of collateral estoppel, the Third Circuit stated that, in its view, no equitable concerns which counsel against preclusion are raised in this case. (App., *infra*, 2a) The Third Circuit's failure to consider the fundamental constitutional principles at issue in this case is evident.

The Third Circuit's misapprehension of the legal and equitable consequences at stake is revealed in the perfunctory manner in which the issues were summarily discounted. *Id.* The Third Circuit's failure to perceive the equitable concerns in this case is at odds with this Court's thorough discussion of those principles in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322(1979).

Thus, in turning immediately to the application of *United States v. Stauffer Chemical Co.*, 464 U.S. 165(1984), the Third Circuit's analysis is fundamentally flawed. In determining whether a case is "so similar" that application of *Stauffer* is appropriate, the similarities which inevitably appear in any matter where the issue to be precluded is immunity are deceptive.

In finding the cases "sufficiently similar" to apply *Stauffer*, the Third Circuit narrowly focused on the similarity in the current and prior unrelated case. Both

cases involve PA PUC's claim of immunity raised to preclude suit brought by Amtrak pursuant to an alleged federal exemption. These similarities apparently drew the court's focus from the relevant and serious equitable concerns which arise by application of estoppel to bar a state's Eleventh Amendment immunity defense.

In any event, the Third Circuit was wrong to bar the PA PUC's Eleventh Amendment right by application of collateral estoppel based on denial of immunity in a prior unrelated matter. The elements for satisfying the rule of preclusion are not met, and even if the elements appear to be satisfied, this case presents the classic "unmixed question of law" exception to the application of the rule.

A) Since a state agency's claim of sovereign immunity is not essential to the judgment on the merits of the action in which the defense is raised, the doctrine of collateral estoppel does not apply to preclude the defense in subsequent unrelated cases

As recognized by the Third Circuit, the general rule for application of the doctrine of collateral estoppel is set forth at the Restatement (Second) of Judgments:

§ 27. Issue Preclusion – General Rule

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

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Restatement (Second) of Judgments (1982).

In applying this rule, it was necessary for the Third Circuit to find that that the issue of sovereign immunity was "essential" to judgment on the merits in the prior proceeding. (App., *infra.* 6a)

1) The Third Circuit's opinion that the denial of sovereign immunity was essential to the judgment in the prior proceeding conflicts with this Court's opinion in *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*

A finding that the claim of sovereign immunity is essential to the judgment on the merits in a proceeding is at odds with this Court's rational and holding in *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.* 506 U.S. 139, 145 (1993), which finds that the issue of sovereign immunity typically is *not* essential to the judgment in a proceeding.

The signature case permitting immediate appeal of the denial of Eleventh Amendment immunity from suit, upon which the Third Circuit based its acceptance of jurisdiction in this matter, specifically recognizes that the issue is immediately appealable because it does *not* depend on the development of the facts or other legal issues in the case:

> To come within the small class of . . . Cohen, the order must (1) conclusively determine the disputed question, ***(2) resolve an important issue completely separate from the merits of the action,*** and (3) be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v.*

> *Livesay*, 437 U.S. 463, 468 (1978)(footnote omitted). Denials of States' and state entities' claims to eleventh Amendment immunity purport to be conclusive determinations that they have no right not to be sued in federal court. Moreover, a motion by a State or its agents to dismiss on Eleventh Amendment grounds involves a claim to a fundamental constitutional protection, *cf. Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 502-503, 104 L.Ed.2d 548, 109 S.Ct. 1976 (1989)(SCALIA, J., concurring), whose resolution generally will have no bearing on the merits of the underlying action.

Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., at 145 (emphasis added).

Therefore, the grant or denial of sovereign immunity is, by its very nature, not essential to the judgment on the merits rendered in the case. Thus, the essential element of the application of collateral estoppel, that the determination be essential to the judgment, is not met in the present case. The standard refers to an essential element of judgment of the merits of the underlying case, not an essential element of the affirmative defense which is so obviously severable from the underlying case that it can be immediately appealed.

2) The Third Circuit's opinion that a denial of sovereign immunity may be binding in future litigation conflicts with this Court's opinion in *Mathias v. Worldcom Technologies, Inc*[2].

The Third Circuit simply failed to recognize that a denial of immunity in a prior unrelated case should not be afforded preclusive effect.

In a recent case before this Court, *Mathias. v. Worldcom Technologies, Inc.*, 535 U.S. 682 (per curiam)(2002), Certiorari was originally granted to consider the issue of denial of sovereign immunity. When it became apparent after full briefing and argument that the party claiming the immunity had prevailed below, Certiorari was dismissed as improvidently granted. This Court observed the principle that, where denial of immunity occurs, that denial would not have preclusive effect in future cases. This Court described the denial of sovereign immunity in that case as "uncongenial findings, not essential to the judgment and not binding upon them in future litigation." *Id.*

The PA PUC maintained before the Third Circuit that the denial of its sovereign immunity was not essential to the judgment in the prior case and therefore, should not be afforded preclusive effect. The Third Circuit rejected this argument on the basis that denial of immunity was essential to the District Court's denial of

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[2] The per curiam decision of this Court in *Mathias* was decided during the time period in which the Third Circuit was considering the PA PUC' s timely petition for reconsideration. The PA PUC advised the Third Circuit of *Mathias*, pursuant to F.R.A.P. 28(j) by letter dated May 20, 2002. None the less, reconsideration was denied. (App., infra 75a-76a)

the PA PUC's request to dissolve the existing injunction on the basis of immunity. (App., *infra. 22* a, fn. 5)

The Third Circuit erred by focusing on the denial of immunity and the consequent denial of relief associated with the claim of immunity as the "judgment." The unique nature of the sovereign immunity defense is that it is entirely unrelated to the action in which it raised. Since the relevant focus in determining whether an issue should be afforded preclusive effect is on the underlying claim against which immunity is raised, the Third Circuit erred by not focusing on the claim brought by Amtrak.

The underlying claim in the prior proceeding was Amtrak's motion to enlarge the injunction. The PA PUC's claim of immunity had no bearing whatsoever on that claim. This fact is particularly evident because the claim brought by Amtrak was dismissed on grounds entirely unrelated to the immunity defense. (App., *infra.* 69a-69a) Therefore, it is clear that the District Court's denial of immunity in the prior proceeding was not essential to the judgment.

Since denial of the PA PUC's claim of immunity was not essential to the judgment in the prior proceeding, the Third Circuit's action in affording preclusive effect to denial of immunity is clear error.

The action of the Third Circuit in affording preclusive effect to denial of immunity in a prior unrelated matter is in conflict with the opinions of this Court in *Mathias* and *Puerto Rico*, and requires review of this Court to correct.

B) The "unmixed question of law" exception to the application of collateral estoppel is applicable to a claim of sovereign immunity, as a pure question of law

Where the elements of issue preclusion appear to be met, the Restatement provides exceptions to the applicability of the general rule:

> § 28. Exceptions to the General Rule of Issue Preclusion
>
> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> * * *
>
> (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws
>
> * * *

Restatement (Second) of Judgments, § 28 (1982). The Restatement provides a specific illustration of the correct application of the exception:

Illustrations:

> 2. A brings an action against the municipality of B for tortuous injury. The court sustains B's defense of sovereign immunity and dismisses the action. Several years later A brings a second action against B for an unrelated tortuous injury occurring after the dismissal. The judgment in the first action is not conclusive on the question whether the defense of sovereign immunity is available to B.

Applying this illustration to the case at hand, this case is on all fours with the illustration. The issue before the Third Circuit was whether the PA PUC's claim of sovereign immunity should be precluded by application of the rule for issue preclusion based on a denial of that immunity in a prior unrelated matter. Thus, the Third Circuit's failure to apply the exception is in direct conflict with the Restatement (Second).

The Third Circuit applied this Court's holding in *Stauffer*, which recognized the "unmixed questions of law" exception to the rule for issue preclusion enunciated in Restatement, though expressing uncertainty as to its application. As pointed out by the Third Circuit, this Court has acknowledged that "the exception is generally recognized" and has been "frank to admit uncertainty as to its application." (*App., infra, 12a*)(citations omitted) The Third Circuit was also frank to admit that "the exception is not easily summarized." (*App., infra,* 14a)(*quoting, Burlington N.R.R. Co. v. Hyundai Merchant Marine*, 63 F. 3d 1227, 1236(3d Cir. 1995) However, this case presents no

doubt as to the application of the "unmixed question of law" exception.

In the present case the issue to be precluded is sovereign immunity, clearly a question of law, as the example in the Restatement illustrates. The Third Circuit readily acknowledged that the present proceeding is unrelated to the prior proceeding in which the PA PUC's claim of immunity was denied. (App., *infra*, 16a)(noting that the two actions present distinct claims) Therefore, the Restatement's illustration of the application "unmixed question of law" exception was precisely before the Circuit Court.

However, the Circuit Court declined to apply the "unmixed questions of law" exception on the erroneous assumption that nothing in "the current situation implicates any of the concerns underlying the "unmixed questions of law" doctrine. (App., *infra*, 16 a) Yet, this case presents a text book case for application of the exception. If equitable considerations underlying the exception do not arise in this proceeding, the viability of the exception is brought into question. As illustrated in the Restatement, the exception should be applied in the present matter.

In the present case, the Third Circuit has rendered a decision which is contrary to the dictates of the Restatement (Second) of Judgments, despite its claim that it has "consistently applied this general rule in determining the collateral effect of federal court judgments." (App., *infra*, 6a.) This obvious contradiction requires grant of certiorari to resolve.

III. The opinion of the Third Circuit has unintended and far-reaching deleterious effect upon a state agency's claim of sovereign immunity

A) The Third Circuit opinion exposes the PA PUC's claim of sovereign immunity to preclusion by application of offensive non-mutual estoppel

The Third Circuit's holding might be extended further through the application of offensive non-mutual collateral estoppel, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.4 , where "a litigant who was not a party to a prior judgment may nevertheless use that judgment 'offensively' to prevent a defendant from relitigating issues resolved in the earlier proceeding." *Id.*

The holding of the Third Circuit opens the door for any party to sue the PA PUC in federal court regardless of the PA PUC's ability to prove that it is, indeed, an arm of the Commonwealth of Pennsylvania. Such a result is unquestionably contrary to the intentions of Congress in adopting the Eleventh Amendment, which is intended to insulate the States, including the Commonwealth of Pennsylvania from the indignities of repeated litigation in federal courts.

The Third Circuit states that "The sole effect of estoppel in this context will be to afford Amtrak access to the federal courts (that other utilities may conceivably be denied) unless and until the circumstances of the PUC materially change." (App., *infra*, 17a) The court bases this on *U.S. v. Mendoza*, 464 U.S. 154, 164 (1984) and states that "the government is still free to litigate that issue in the future with some other party." (App., *infra*, 17a)

The Third Circuit's attempt to apply the rule in *United States v. Mendoza* to limit the effect of its order to cases involving Amtrak creates a "Catch 22." *Mendoza* stands for the proposition that collateral estoppel may be applied to preclude an issue decided in a matter to which the government was a party, but only as to the same parties. However, the issue to which the Third Circuit applied estoppel was whether the PA PUC is an arm of the state at all. In order to be eligible for the limitation of application of estoppel under *Mendoza*, the party must be the government. Arguably, if it is decided that the PA PUC is not an arm of the state entitled to raise immunity, it follows that it is also not the "government" entitled to the limiting effect of *Mendoza*.

Thus, the Third Circuit's attempt to limit the deleterious effect of its order may not insulate the PA PUC. The PA PUC's concerns in this regard are not theoretical. In fact, the Third Circuit's holding has already been cited in state court litigation as authority to defeat the PA PUC's sovereign immunity[3].

In the current case, absent a material change in circumstances, the PA PUC is forever barred from claiming its rightful immunity from suits against Amtrak simply because the PA PUC failed to satisfy its burden of proof in a prior unrelated proceeding. Such a result contravenes the purpose behind and overall effectiveness of the Eleventh Amendment and subsequent case law, which seeks to prevent "the indignity of subjecting a state to the coercive process of

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[3] *Pennsylvania Industries for the Blind and Handicapped v. Pennsylvania Public Utility Commission*, No. 121 MAP 2002, (Appellee's Opening Brief) (citing *Nat'l Railroad Passenger Corp. v. Pa. Pub. Util. Comm'n*, 288 F.3d 519 (3rd Cir. 2002))

judicial tribunals at the instance of private parties." *Alden v. Maine*, 527 U.S. 706, 749 (citation omitted).

The Third Circuit has already undermined a principle that the founders viewed as integral to preserving state sovereignty by requiring the PA PUC to submit to suit by Amtrak. Through application of the doctrine of offensive non-mutual estoppel the PA PUC' sovereign immunity claim might be subject to further attack.

B) The Third Circuit's deprivation of the PA PUC's right to claim Eleventh Amendment immunity is ongoing injury which may evade review if Certiorari is not granted

Contrary to the scenario presented before this Court in *Mathias. v. Worldcom Technologies, Inc.*, in which the denial of sovereign immunity was deemed moot when it became apparent the party raising the claim had ultimately prevailed below, the Third Circuit's application of collateral estoppel to bar the PA PUC's claim of immunity results in an ongoing violation of the PA PUC's Eleventh Amendment rights because it bars the defense in any future case which Amtrak may bring. Therefore, the PA PUC's deprivation of sovereign immunity will not be rendered moot, even if the District Court dismisses Amtrak's current action.

Despite request by the PA PUC that the District Court postpone pretrial activities until the outcome of this Petition for Writ of Certiorari, the judge ordered and is presently considering motions for summary judgment which may decide the case on the merits. Should that occur, the matter raised by this Petition is not moot because, as is evident from this case, the question could repeatedly evade review.

A judge who does not stay the substantive case and does not permit a party to even claim, let alone prove, entitlement to Eleventh Amendment immunity from suit, effectively prevents that party from ever benefiting from that immunity. The party, here the PA PUC, would be subjected to "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico Aqueduct*, at 139 (citation omitted).

Since "States and state entities that claim to be 'arms of the State' may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity," *Id.*, then their right to make that claim in an active case or in the future should be decided regardless of whether the District Court judge has disposed of the case itself.

Where a controversy is capable of repetition yet evading review, it is not moot. *Press-Enterprise Co. v. Superior court of California for the County of Riverside*, 478 U.S. 1 (1986), citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). Here, the District Court has already shown that it will not stay the substantive case pending the outcome of this Court's decision on the state's right to even claim immunity from suit. This scenario is likely to repeat, thus making it imperative to consider the PA PUC's right to claim Eleventh Amendment immunity from suit in future cases.

Accordingly, even if the District Court decides the substantive case below in favor of the PA PUC prior to this Court's decision on whether to grant this Petition for Writ of Certiorari, and, if granted, the subsequent briefs, the questions presented in this petition will not be rendered moot.

The Third Circuit's ongoing deprivation of the PA PUC's right to claim Eleventh Amendment immunity is an unacceptable departure from acceptable judicial practice in conflict with the holdings of this Court and requires review of this Court to correct.

CONCLUSION

For the foregoing reasons, the Pennsylvania Public Utility Commission and its individually named Commissioners respectfully request that this Honorable Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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(Any footnotes trail the end of each document.)
No. 01-2419

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL RAILROAD PASSENGER CORPORATION

v.

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION; JOHN M. QUAIN, CHAIRMAN; ROBERT K. BLOOM, VICE CHAIRMAN; NORA MEAD BROWNELL, COMMISSIONER; AARON WILSON, JR., COMMISSIONER; TERRENCE J. FITZPATRICK, COMMISSIONER; NORFOLK SOUTHERN RAILWAY COMPANY; CSX TRANSPORTATION, INC.; THE SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY; JOHN K. LEARY, GENERAL MANAGER; The Pennsylvania Public Utility Commission; John M. Quain, Chairman; Robert K. Bloom, Vice Chairman; Nora Mead Brownell, Commissioner; Aaron Wilson, Jr., Commissioner; Terrence J. Fitzpatrick, Commissioner
Appellants

January 22, 2002, Argued

May 1, 2002, Filed

COUNSEL:
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John L. Moore, Jr. (Argued), Piper, Marbury, Rudnick & Wolfe, Washington, DC and Joseph Kernen, Elizabeth J. Feeney, Piper, Marbury, Rudnick & Wolfe, Philadelphia,

PA, Attorneys for Appellee.

JUDGES:
BEFORE: NYGAARD and STAPLETON, Circuit Judges, and CAPUTO, * District Judge.

OPINIONBY:
STAPLETON

OPINION:

OPINION OF THE COURT

STAPLETON, Circuit Judge:

In this appeal we consider whether the District Court properly applied the doctrine of collateral estoppel to preclude the Pennsylvania Public Utility Commission (the "PUC") from relitigating its claim to Eleventh Amendment immunity. Because we find that all requirements for application of collateral estoppel are met and no equitable considerations counsel against its application, we will affirm.

I.

This case arises out of proceedings initiated by the Southeastern Pennsylvania Transportation Authority ("SEPTA") before the PUC. SEPTA petitioned the PUC for the right to construct certain "partial high-level passenger platforms" at five passenger stations owned by National Railroad Passenger Corporation ("Amtrak"), along Amtrak's northeast corridor. Although Amtrak was not a party to the administrative adjudication, Amtrak advised the PUC that in its view the PUC had no jurisdiction over the issues raised by SEPTA because those issues were either preempted by federal law or

subject to arbitration. Despite Amtrak's objection, the PUC administrative law judge adjudicated the matter and issued a recommended decision. On appeal to the full PUC, the Commissioners ordered the ALJ to reopen the proceeding and issued an order joining Amtrak as an indispensable party to the proceeding.

Prior to a scheduled pre-hearing conference on remand to the ALJ, Amtrak filed this action against the PUC and the PUC's five commissioners asserting its federal preemption claims and seeking to compel arbitration. In response, the PUC[1] filed a motion to dismiss this case asserting, among other things, that the PUC was an arm of the government of the Commonwealth of Pennsylvania and immune from suit in federal court under the Eleventh Amendment. Amtrak opposed the motion arguing that the PUC was precluded from relitigating its status under the Eleventh Amendment because Amtrak had already won a prior decision against the PUC on that issue in 1997 in *National Railroad Passenger Corp. v. Commonwealth of Pennsylvania Public Utility Commission, 1997 U.S. Dist. LEXIS 14585, 1997 WL 597963*, (E.D. Pa. Sep. 15, 1997). In 1987, in the earlier suit, Amtrak secured a permanent injunction, based on the authority of *45 U.S.C. § 546b*,[2] barring the PUC from assessing against Amtrak the cost of maintaining the Cassatt Avenue highway bridge in the Townships of Tredyffrin and Easttown, Pennsylvania. See *National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n, 665 F. Supp. 402 (E.D. Pa. 1987)*. This Court affirmed. See *848 F.2d 436 (3d Cir. 1988)*. Several years later, Amtrak moved to broaden the injunction to bar assessment of Amtrak for the repair, maintenance or replacement of any highway bridges in the Commonwealth. In response, the PUC asked the court to dissolve the injunction on the ground that it was entered in violation of its Eleventh Amendment

immunity. Specifically, the PUC argued that the District Court could not base its injunction on *49 U.S.C. § 24301*(l) because that provision was enacted under Congress's Article I powers and thus could not abrogate the PUC's immunity. Amtrak made three arguments in opposition to the PUC's motion. First, Amtrak contended that Eleventh Amendment immunity should not apply because it is a federal entity. Second, Amtrak argued that the PUC could not raise the shield of immunity because it is not an arm or alter ego of the state. Finally, Amtrak argued that it should be allowed to amend its complaint to include the individual commissioners because it sought only prospective injunctive relief, and these individuals were amenable to suit under *Ex parte Young, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908).*

On September 15, 1997, the District Court issued a comprehensive memorandum opinion denying the PUC's motion to dissolve the injunction. After finding that Amtrak is not a federal entity for the purposes of the doctrine of Eleventh Amendment immunity, the District Court considered the question of whether the PUC is an arm of the Commonwealth of Pennsylvania entitled to Eleventh Amendment immunity. See *National R.R. Passenger Corp., 1997 WL 597963*, at *6. The court properly analyzed this issue under the three prong test of *Christy v. Pennsylvania Turnpike Commission, 54 F.3d 1140 (3d Cir. 1995)*, which requires a court to determine:

(1) whether, in the event the plaintiff prevails, the payment of the judgment would come from the state (this includes three considerations: whether the payment will come from the state's treasury, whether the agency has sufficient funds to satisfy the judgment, and whether the sovereign has immunized itself from

responsibility for the agency's debts); (2) the status of the agency under state law (this includes four considerations: how state law treats the agency generally, whether the agency is separately incorporated, whether the agency can sue and be sued in its own right, and whether it is immune from state taxation); and (3) what degree of autonomy the agency enjoys.

Id. at 1144-45.

The District Court found that the first factor, the source of the funds to satisfy any judgment, "weighed heavily in support of the finding that the [PUC] is not an arm or alter ego of the Commonwealth." *National R.R. Passenger Corp., 1997 WL 597963*, at *8. However, it found that the second factor, the "status under the law," weighed in favor of the PUC, and the third factor, autonomy, weighed "ever so slightly in favor of the [PUC]." Id. at *10. In balancing the relative merit and weight of all three factors, the District Court concluded that because the funding factor was the most important factor and it weighed so heavily against the PUC, "the second and third factors, although weighing in favor of the [PUC], simply do not tip the scales in favor of a finding" that the PUC is an arm or alter ego of the Commonwealth. Id. Thus, the court concluded that the PUC is not protected by Pennsylvania's cloak of Eleventh Amendment immunity and declined to dissolve the injunction. The PUC did not appeal from this decision or the District Court's February 1998 denial of the PUC's renewed motion to dissolve the injunction filed under Rule 60(b).

In this case, the District Court held that the PUC was collaterally estopped to relitigate the issue of whether it was entitled to Eleventh Amendment immunity. Accordingly, it denied the PUC's motion to dismiss. The

PUC timely appealed invoking this Court's jurisdiction under the collateral order doctrine. See *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 121 L. Ed. 2d 605, 113 S. Ct. 684 (1993).*

II.

In *Witkowski v. Welch, 173 F.3d 192, 198 n.7 (3d Cir. 1999)*, we noted that different panels of our Court have applied different standards of review where collateral estoppel is in issue. As in Witkowski, it is unnecessary for us to resolve this apparent conflict. Applying the more exacting, plenary standard, we conclude that the District Court must be affirmed.

III.

The Restatement (Second) of Judgments articulates the general rule of collateral estoppel, or in its terminology "issue preclusion," as follows: "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Restatement (Second) of Judgments § 27 (1980). We have consistently applied this general rule in determining the collateral effect of federal court judgments. In *Burlington Northern Railroad Co. v. Hyundai Merchant Marine, 63 F.3d 1227 (3d Cir. 1995)*, for example, we held that the "prerequisites for the application of issue preclusion are satisfied when: '(1) the issue sought to be precluded [is] the same as that involved in the prior action, (2) that issue [was] actually litigated; (3) it [was] determined by a final and valid judgment; and (4) the determination [was] essential to the prior judgment.' " *Id. at 1231-2* (quoting from *In re Graham, 973 F.2d 1089, 1097 (3d Cir. 1992))*; see also *Hawksbill Sea Turtle v. FEMA, 37 V.I. 526, 126*

F.3d 461, 474-75 (3d Cir. 1997); Raytech Corp. v. White, 54 F.3d 187, 190 (3d Cir. 1995).

This general rule is subject to a number of equitable exceptions designed to assure that the doctrine is applied in a manner that will serve the twin goals of fairness and efficient use of private and public litigation resources. The equitable factors to be considered in a particular case depend in part on (1) whether both parties to the subsequent suit were also parties to the first so that there is "mutuality of estoppel," see *Blonder-Tongue Labs., Inc. v. University of Ill. Found., 402 U.S. 313, 328-29, 28 L. Ed. 2d 788, 91 S. Ct. 1434 (1971)* and (2) whether the estoppel is being asserted (a) "offensively" by a plaintiff seeking to estop a defendant from relitigating issues which the defendant has previously litigated and lost, or (b) "defensively" by a defendant seeking to estop a plaintiff from relitigating an issue which the plaintiff has previously litigated and lost, see *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 328, 58 L. Ed. 2d 552, 99 S. Ct. 645 (1979).* This is a case of offensive mutual estoppel. The relevant equitable factors to be considered in a case of mutual collateral estoppel are summarized in Section 28 of the Restatement Second.[3]

The PUC contends that (1) the issue in the 1997 proceeding was not the same as the issue asserted here; (2) the Eleventh Amendment issue was not actually determined in the first proceeding; (3) the determination in the first proceeding was not necessary to the judgment of the court; (4) all of the parties sought to be estopped here were not parties to the first proceeding; and (5) equitable considerations preclude application of collateral estoppel in this case. We examine each of these contentions in turn.

1. The Identity of the Issues

The PUC claims that the Eleventh Amendment immunity issue presented to the District Court in 1997 is not identical to the issue in the case at bar because "in the prior proceeding Amtrak[ ] claimed that the PA PUC was barred from charging any fees to Amtrak pursuant to *49 U.S.C. § 24301*(l) . . ., and in the present proceeding Amtrak[ ] claims that *49 U.S.C. § 29402*(j) . . . bars the PA PUC from ruling on safety issues involving Amtrak's property."[4] This argument misses the point. As noted in the Restatement, if the issues presented and determined in the two proceedings are the same, it does not matter whether they arise in the context of "the same or a different claim." Although it is true that the 1997 proceeding and the present proceeding involve claims predicated on different sections of the code, one issue considered by the court in both proceedings was whether the PUC was entitled to assert Eleventh Amendment immunity when sued by Amtrak. The District Court fully considered and determined that issue in the 1997 proceeding.

2. Actual Determination of the Relevant Issue

An argument heading in the PUC's brief asserts that the "District Court's decision in [the] previous matter was not 'final, valid and on the merits.' " It does not contend, however, that the 1977 decisions denying the PUC's application to dissolve the injunction were not final ones or that the District Court lacked subject matter or personal jurisdiction to determine the matter of its own jurisdiction to enter the injunction. It does, however, contend that the District Court did not resolve the Eleventh Amendment issue in 1997 "on the merits" – its way of saying that this issue was not, in Restatement terminology, "actually determined."

The sole case cited in support of this argument by the *PUC is Frazier v. Southeastern Pennsylvania Transportation Authority, 868 F. Supp. 757 (E.D. Pa.*

1994). In that case, SEPTA filed a preliminary objection in a state court proceeding seeking a dismissal on the theory that it was entitled to sovereign immunity. The plaintiff responded by arguing that under Pennsylvania pleading practices, sovereign immunity can only be raised as a defense in an answer and new matter, not by preliminary objection. Alternatively, the plaintiff argued that SEPTA was not entitled to sovereign immunity. The state court issued an order overruling SEPTA's preliminary objection without explanation. In a subsequent federal proceeding, the District Court refused to give the state court's order collateral effect because the order "contained neither a statement of the reasons for the decision nor a supplement providing an opinion explaining the rationale." *Id. at 761*. Thus, the District Court was unable to determine whether the state court reached the sovereign immunity issue or decided the motion before it on the procedural grounds asserted by the plaintiff.

The decision in Frazier is inapposite. Here there is no question that the District Court reached and determined the Eleventh Amendment issue in the 1997 proceeding. The District Court carefully considered and weighed each of the Christy factors in order to determine whether the PUC was entitled to Eleventh Amendment immunity and unambiguously determined that it was not.

3. Essential to the Judgment

The Restatement (Second) of Judgments explains in the following terms the rationale behind the requirement that the initial resolution of the relevant issue be essential to the judgment:

If issues are determined but the judgment is not dependent upon the determinations, relitigation of those

issues in a subsequent action between the parties is not precluded. Such determinations have the characteristics of dicta, and may not ordinarily be the subject of an appeal by the party against whom they were made. In these circumstances, the interest in providing an opportunity for a considered determination, which if adverse may be the subject of an appeal, outweighs the interest in avoiding the burden of relitigation.

Restatement (Second) of Judgments § 27, cmt. h; see also *O'Leary v. Liberty Mut. Ins. Co., 923 F.2d 1062 (3d Cir. 1991).*

Thus, in determining whether the issue was essential to the judgment, we must look to whether the issue "was critical to the judgment or merely dicta." *O'Leary, 923 F.2d at 1067.* In the 1997 decision, the District Court held that the PUC was not entitled to Eleventh Amendment immunity and this holding was necessary to the outcome of the proceeding. If the District Court had ruled differently on that issue, it would have dissolved the outstanding injunction. Its holding on the immunity issue was thus essential to its judgment denying the PUC's application and leaving the injunction in place.[5]

4. Same Parties

Only the PUC as an entity and not the commissioners were parties to the 1997 proceeding. The PUC, therefore, contends that collateral estoppel was improperly applied to the commissioners in this proceeding. This contention ignores the fact that the commissioners in their official capacity comprise the PUC and did participate in the 1997 decision. Accordingly, it was entirely appropriate for the District Court to apply collateral estoppel against them to the extent they rely upon their official status to support a claim of Eleventh Amendment immunity.[6] See *Tait v. Western Md. Ry. Co., 289 U.S. 620, 626-27, 77 L. Ed.*

1405, 53 S. Ct. 706 (1933).

5. Equitable Concerns

Even when the requirements of the general rule of collateral estoppel are satisfied, the Court must consider whether there are special circumstances present which make it inequitable or inappropriate to foreclose relitigation of a previously determined issue. PUC contends that such special circumstances are present here. Specifically, it contends that relitigation is warranted (1) because the Eleventh Amendment immunity issue is an "unmixed question of law" and this suit involves a matter "unrelated" to that involved in the prior proceeding and (2) because relitigation is required "in order to take into account intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws." Appellants' Brief pp. 32, 35 (quoting from Restatement (Second) of Judgments § 28(2)).[7]

A. Unmixed Question of Law

In *United States v. Moser, 266 U.S. 236, 69 L. Ed. 262, 45 S. Ct. 66 (1924)*, Moser, a retired Navy captain, had previously litigated before the Court of Claims his right to an enhanced pension under a statute providing for an enhancement for "service during the Civil War." The Court, in applying the statute to his particular case, had given him credit for time spent as a Naval Academy cadet during the Civil War. Subsequently, the Court of Claims changed its interpretation of the statute and Moser was forced to bring a new suit to secure continuing payment of an enhanced pension. The Court of Claims held that collateral estoppel barred the government from relitigating Moser's right. The Supreme Court affirmed, observing in part:

The contention of the Government seems to be that the

doctrine of res judicata does not apply to questions of law; and, in a sense, that is true. It does not apply to unmixed questions of law. Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a fact, question or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law.

Id. at 242 (emphasis in original).

The Supreme Court last considered the Moser "unmixed question of law" exception to the general rule of issue preclusion in *United States v. Stauffer Chemical Co., 464 U.S. 165, 78 L. Ed. 2d 388, 104 S. Ct. 575 (1984)*. Stauffer litigated with the EPA in two suits involving different attempted inspections at two different plants the issue of whether a private contractor could be an "authorized representative" of the EPA within the meaning of the statute conferring the right to inspect. The EPA lost on this issue in the first proceeding and relied upon the "unmixed question of law" exception in support of its contention that it should not be precluded from relitigating the statutory interpretation issue in the second proceeding. The Supreme Court acknowledged that "the exception is generally recognized" but was "frank to admit uncertainty as to its application." It described the exception in the following terms:

The exception seems to require a determination as to whether an "issue of fact" or an "issue of law" is sought to be relitigated and then a determination as to whether

the "issue of law" arises in a successive case that is so unrelated to the prior case that relitigation of the issue is warranted. Yet we agree that, for the purpose of determining when to apply an estoppel, "when the claims in two separate actions between the same parties are the same or are closely related . . . it is not ordinarily necessary to characterize an issue as one of fact or of law for purposes of issue preclusion. . . . In such a case, it is unfair to the winning party and an unnecessary burden on the courts to allow repeated litigation of the same issue in what is essentially the same controversy, even if the issue is regarded as one of 'law'."

Id. at 171 (quoting Restatement (Second) of Judgments § 78, cmt. b). The Court refused to apply the exception, holding that "the doctrine of mutual collateral estoppel is applicable against the government to preclude relitigation of the same issue already litigated against the same party in another case involving virtually identical facts." *Id. at 169.*

More recently, we, too, recognized the continuing vitality of the "unmixed question of law" exception while acknowledging that its scope remains uncertain. *Burlington N. R.R. Co., 63 F.3d at 1236.* We there declined to apply the exception and held that the general rule of preclusion governed in a situation involving two suits for indemnity brought against Burlington by different downstream carriers arising from two different shipments in which goods were damaged while allegedly in the possession of Burlington. In the first suit, Burlington asserted that the indemnity claim was barred by a provision in the carriage contract requiring that any suit be brought no later than one year after the date of delivery of the goods. The Court in the first suit held that despite this provision, the timeliness of suit was to be determined by the general rule of indemnity accrual – i.e., that an

indemnity claim does not accrue until the indemnitee's liability is determined by judgment or payment. In the second carrier's suit for indemnity arising from a different damaged shipment, Burlington attempted to assert that the suit was untimely based upon a similar, "nine month from delivery" limitation in the carriage contract. We explained our refusal to apply the "unmixed question of law" exception as follows:

While, as Burlington points out, the contractual limitations provisions in this case provides for a shorter period of time (nine months as opposed to one year), and applies to the presentation of "claims" as compared to the filing of "suits," these distinctions are of no legal significance to the issue decided in Atlantic Mutual and presented here. In both cases Burlington denied the indemnity claims on the grounds that they were untimely because the contract term limited liability to a period of time (commencing at the date of delivery) that had already run. Similarly, in both actions, the indemnity claimant sought recovery notwithstanding such provision on the grounds that any time limit for indemnity claims must commence when liability is determined or a cognizable loss is incurred. In sum, given these relevant similarities, we cannot conclude that the issue of law arising in this action is so unrelated to the Atlantic Mutual case that relitigation of the issue is warranted.

Id. at 1237-38.

As our review of Moser, Stauffer and Burlington indicates, the "unmixed question of law" exception is not easily summarized. It is an equitable doctrine which, while recognizing that the court and the adverse party should ordinarily be spared the burden of relitigating an

issue previously determined, nevertheless sounds a note of caution where the issue involved is the choice or formulation of the governing rule of law. Where the same legal issue is presented in two suits but the second suit calls for application of the previously selected rule of law in a significantly different context, it may be inappropriate to preclude a party from contending that the governing rule of law applied in the first was erroneously chosen or formulated. It is not necessary, however, that the "two cases . . . must arise from the very same facts or transaction before an estoppel can be applied." *Stauffer Chem. Co., 464 U.S. at 172 n.5.* Indeed, estoppel should be applied unless "the 'issue of law' arises in a successive case that is so unrelated to the prior case that relitigation is warranted." *Burlington N. R.R. Co., 63 F.3d at 1237* (quoting from *Stauffer Chem. Co., 464 U.S. at 172 n.5).*

Whether the context in which the legal issue is presented in the second suit is sufficiently unrelated to that in the first to counsel against preclusion is a decision that should be made with reference to the consequences of preclusions for the precluded party and the administration of justice. A significantly different context, for example, may make it more likely that the second suit and the stake there at issue were not foreseen at the time of the first suit. Moreover, insistence on estoppel in a new context may in some situations unduly impede the development of the law. Such insistence may also impose an unfair competitive disadvantage on the party who is precluded from rearguing questions of law that would be open to challenge by other litigants. Finally, when the party to be precluded is a public agency responsible for administration of a governmental program, preclusion may impair its ability to regulate in a coherent manner. See 18 Charles Alan Wright, et al., Federal Practice and Procedure § 4425, at 244 (1981).

The District Court did not foreclose the PUC from challenging a legal precept. The PUC never sought to argue that Christy v. Pennsylvania Turnpike Authority did not provide the appropriate legal standard. Rather, it sought to argue that the District Court had erroneously applied that standard to the particular circumstances of the PUC at the time of the first suit at least in part because it did not have sufficient information about those particular circumstances. In support of its request for relitigation, the PUC submitted evidence of its particular circumstances which supplemented its submission in 1997. It did not, however, submit any evidence that its circumstances had changed since that time. The fact that the PUC may not have submitted all of the relevant evidence available to it in 1997, hardly justifies placing on Amtrak the burden of relitigating the application of the Christy legal principles to the unchanged circumstances of the PUC.

Moreover, while it is true that the two relevant proceedings here present distinct preemption issues, the issue as to which estoppel is sought does not arise in such a different context that the current situation implicates any of the concerns underlying the "unmixed question of law" doctrine. Amtrak and the PUC undoubtedly foresaw in 1997 that there would be repeated issues of importance that could bring them before a federal court. Moreover, foreclosing the PUC from relitigating its Eleventh Amendment immunity issue with Amtrak will not impede the development of the law because the PUC will remain free to relitigate that issue with anyone else who hauls it into federal court. See *United States v. Mendoza, 464 U.S. 154, 164, 78 L. Ed. 2d 379, 104 S. Ct. 568 (1984)* ("The application of an estoppel when the government is litigating the same issue with the same party avoids the problem of freezing the development of the law because the government is still free to litigate that issue in the

future with some other party.") Nor is this a case in which insistence on estoppel will place the PUC at a competitive disadvantage or impair its ability to effectively regulate. The PUC is not being foreclosed from enforcing any regulatory rule against Amtrak that is enforceable against others. The sole effect of estoppel in this context will be to afford Amtrak access to the federal courts (that other utilities may conceivably be denied) unless and until the circumstances of the PUC materially change.

For these reasons, we decline to apply the "unmixed question of law" exception to the general rule of issue preclusion.

B. Intervening Change in the Legal Context and Avoidance of Inequitable Administration of the Law.

Under this argument heading, the PUC contends that the estoppel applied by the District Court is inequitable because (1) the PUC's Eleventh Amendment immunity has been previously recognized in other suits, (2) the PUC here tenders evidence not considered in the first proceeding, (3) the PUC had "no expectation that [the] determination [in the first proceeding] would forever bar its claim of sovereign immunity," and (4) estoppel here might "expose it to application of offensive non-mutual collateral estoppel."

None of the authorities cited by the PUC hold that it is entitled to Eleventh Amendment immunity. n8 Moreover, our conclusion here would be no different even if a court had previously so held in a suit to which Amtrak was not a party.

We believe that we have earlier explicitly or implicitly rejected each of the remaining contentions. The ability of the PUC to litigate its Eleventh

Amendment immunity with parties other than Amtrak presents a materially different issue. See *United States v. Mendoza, supra.*[9]

We perceive no inequity in the application of collateral estoppel in the context of this case.

IV. Conclusion

The judgment of the District Court will be affirmed.

Footnotes

* Honorable A. Richard Caputo, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

n1 Except where it is relevant to distinguish between them, we will refer to the PUC and the individual commissioners collectively as the "PUC."

n2 45 U.S.C. § 546b was passed on September 10, 1982, Pub. L. 97-257, § 107. At the time of the earlier suit the statute provided:

> § 546b. Exemption from taxes or other fees imposed by any State, political subdivision, or local taxing authority levied on the Corporation or any railroad subsidiary; covered period; jurisdiction to enforce exemption Notwithstanding any other provision of law, the National Railroad Passenger Corporation (the "Corporation") shall be exempt from any taxes or other fees imposed by

> any State, political subdivision of a State, or local taxing authority which are levied on the Corporation, or any railroad subsidiary thereof, from and after October 1, 1981, including such taxes and fees levied after September 30, 1982: Provided, however, That notwithstanding any provision of law, the Corporation shall not be exempt from any taxes or other fees which it is authorized to pay as of September 10, 1982. Taxes and fees levied on the Corporation or any railroad subsidiary thereof by States, political subdivisions of States, or local taxing authorities with respect to periods beginning prior to October 1, 1981, shall be payable in proportion to the part of the relevant tax period which elapsed prior to such date. Notwithstanding the provision of section 1341 of title 28, the United States district courts shall have original jurisdiction over any civil actions brought by the Corporation to enforce the exemption conferred hereunder and may grant equitable or declaratory relief as requested by the Corporation.

45 U.S.C. § 546b (1988). This section was repealed by § 7(b) of the Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 1379, and reenacted with linguistic, but not substantive changes and recodified by § 1(e) of the same act, 108 Stat. 904. See H.R. Rep. No. 103-180 at 1, 3, 4 (1993), reprinted in 1994

U.S.C.C.A.N. 818, 820, 822. The relevant section of the 1994 statute stated:

> Exemption from taxes levied after September 30, 1981.
>
> (1) Amtrak or a rail carrier subsidiary of Amtrak is exempt from a tax or fee imposed by a State, a political subdivision of a State, or a local taxing authority and levied on it after September 30, 1981. However, Amtrak is not exempt under this subsection from a tax or fee that it was required to pay as of September 10, 1982.
>
> (2) The district courts of the United States have original jurisdiction over a civil action Amtrak brings to enforce this subsection and may grant equitable or declaratory relief required by Amtrak.

49 U.S.C. § 24301(l) (1994). That section has since been amended by the Act of December 2, 1997. See Pub. L. 105-134, § 208, 111 Stat. 2584. Throughout the remainder of this opinion we will cite to the statute as § 24301.

[3] Section 28 provides:

§ 28. Exceptions to the General Rule of Issue Preclusion

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is

essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

(1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or

(2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or

(3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or

(4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or

(5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other

special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

[4] Both § 24301(l) and § 29402(j) grant Amtrak immunity from the application of certain state and local laws. Section 24301(l) exempts Amtrak from taxes and fees imposed by a State after September 30, 1981. Section 29402(j) exempts Amtrak from state or local building, zoning, subdivision, or other related laws.

[5] Contrary to the PUC's insistence, the issue of whether Amtrak was entitled to modification of the injunction is simply unrelated to the issue of whether the District Court's ruling on immunity was essential to the judgment denying relief to the PUC.

[6] To the extent Amtrak is entitled to proceed against the commissioners in their individual capacities under *Ex parte Young, 209 U.S. 123, 159-60, 52 L. Ed. 714, 28 S. Ct. 441 (1908)*, the issue of Eleventh Amendment immunity does not arise.

[7] See supra, p.8 n.3.

[8] The PUC argues that other courts in the Third Circuit have recognized its Eleventh Amendment immunity and thus the application of collateral estoppel is inappropriate. In making this argument, the PUC relies on three cases from this Court: *Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Public Utility Commission, 273 F.3d 337, 2001 WL 1382537* (3d Cir. Nov. 2, 2001); *MCI Telecommunication Corp. v. Bell Atlantic-Pennsylvania, 271 F.3d 491 (3d Cir. 2001);* and *Wheeling & Lake Erie Railway Co. v. Public Utility Commission of the Commonwealth of Pennsylvania, 141 F.3d 88 (3d Cir. 1998).* These cases, however, do not support the PUC's argument.

In both Bell-Atlantic and MCI, which were consolidated for oral argument on the issue of Eleventh Amendment immunity, we assumed, without deciding, that the PUC was an arm of the Commonwealth. However, we held that under the statutory scheme in question the PUC "knowingly waived its Eleventh Amendment immunity by voluntarily accepting the congressional gift or gratuity of the power to regulate local telecommunications competition under the Act." *MCI Telecommunication Corp., 271 F.3d at 513.* Likewise in Wheeling, the court explicitly stated that the parties did not "dispute that the [PUC] is an arm of the Commonwealth of Pennsylvania protected by Eleventh Amendment principles of sovereign immunity." *141 F.3d at 91.* Thus, this Court did not reach the question at issue here–whether or not the PUC is entitled to Eleventh Amendment immunity as an alter-ego or arm of Pennsylvania–in any of these cases.

[9] The PUC does not explicitly argue, nor could it persuasively maintain, that there has been an intervening change in the applicable legal context. Undoubtedly the Supreme Court has taken up the issue of Eleventh Amendment immunity with vigor since 1997. See, e.g., *Board of Tr. of Univ. of Al. v. Garrett, 531 U.S. 356, 148 L. Ed. 2d 866, 121 S. Ct. 955 (2001); Alden v. Maine, 527 U.S. 706, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 144 L. Ed. 2d 605, 119 S. Ct. 2219 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999);* Idaho v. Couer d' *Alene Tribe of Idaho, 521 U.S. 261, 138 L. Ed. 2d 438, 117 S. Ct. 2028 (1997); Seminole Tribe of Fla. v. Fla., 517 U.S. 44, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996).* However, none of these cases addressed the issue in this case: the

standard for determining whether a party is an arm of the state and thus entitled to the cloak of immunity. Rather these cases considered when Congress can abrogate Eleventh Amendment immunity and when a State can waive its immunity.

CIVIL ACTION NO. 01-302

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATIONAL RAILROAD PASSENGER CORPORATION,
Plaintiff,

v.

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION,
et al., Defendants.

May 10, 2001, Decided

May 10, 2001, Filed

COUNSEL:
For NATIONAL RAILROAD PASSENGER CORPORATION, PLAINTIFF: RONALD P. SCHILLER, PIPER, MARBURY, RUDNICK & WOLFE, LLP, PHILA, PA USA. ELIZABETH J. FEENEY, PIPER, MARBURY, RUDNICK & WOLFE, LLP, PHILADELPHIA, PA USA.

For THE PENNSYVANIA PUBLIC UTILITY COMMISSION, JOHN M. QUAIN, CHAIRMAN, ROBERT K. BLOOM, VICE CHAIRMAN, NORA MEAD BROWNELL, COMMISSIONER, AARON WILSON, JR., COMMISSIONER, TERRENCE J. FITZPATRICK, COMMISSIONER, DEFENDANTS: SUSAN D. COLWELL, PA - PUBLIC UTILITY COMM.-ASST. COUNSEL, HARRISBURG, PA USA.

For NORFOLK SOUTHERN RAILWAY COMPANY, CSX TRANSPORTATION, INC., DEFENDANTS: CRAIG J. STAUDENMAIER, NAUMAN, SMITH, SHISSLER AND

HALL, HARRISBURG, PA USA.

For THE SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, JOHN K. LEARY, JR., GENERAL MANAGER, DEFENDANTS: DAVID P. BRUTON, DRINKER BIDDLE & REATH LLP, PHILADELPHIA, PA USA. KEVIN M. CHU, DRINKER BIDDLE & REATH LLP, PHILADELPHIA, PA USA.

JUDGES:
Clarence C. Newcomer, S.J.

OPINIONBY:
Clarence C. Newcomer

OPINION:

MEMORANDUM

Newcomer, S.J.

May 10, 2001

Presently before the Court are two Motions to Dismiss filed by two groups of defendants, and the plaintiff's responses to each in the above captioned case. The Court will resolve both Motions in today's decision.

I. BACKGROUND

Plaintiff, the National Railroad Passenger Corporation ("Amtrak"), has filed this action pursuant to *28 U.S.C. § 2201* and § 2202 for declaratory and injunctive relief against defendants the Norfolk Southern Railway Company ("NS"), CSX Transportation Corporation ("CSX"), the Pennsylvania Public Utility

Commission and its Commissioners ("PUC"), five individually named PUC Commissioners (the "Commissioners"), and the Southern Pennsylvania Transportation Authority ("SEPTA") and its General Manager. NS and CSX have jointly filed one of the Motions to Dismiss (the "NS-CSX Motion"), while the PUC and the individually named PUC Commissioners have jointly filed the second Motion to Dismiss (the "PUC Motion").

Amtrak is a corporation established by Congress in 1971 pursuant to the Rail Passenger Service Act, *49 U.S.C. § 24101* et seq., with its principal place of business in Washington, D.C. Additionally, the United States owns more than 50 percent of Amtrak's stock.

NS and CSX are Virginia corporations that regularly conduct business in Pennsylvania. The PUC is an administrative body organized and existing under the laws of Pennsylvania, and its powers derive from the Pennsylvania Public Utility Code, 66 PA. CONS. STAT. § § 101 et seq. SEPTA is a regional transportation authority organized and existing under the laws of Pennsylvania. Its powers derive from the Metropolitan Transportation Authorities Act, 74 PA. CONS. STAT. § § 1701-1785.

Amtrak's Complaint brings six counts, each one seeking to enjoin the defendants from continuing with proceedings currently pending before the PUC. In those proceedings (the "underlying case"), SEPTA filed five applications[1] for the construction of five mini high-level platforms at five different commuter stations along a rail corridor owned by Amtrak and on which Amtrak's rail lines are located, the Northeast Corridor right of way.[2] SEPTA's applications seek the PUC to waive certain clearance restrictions that would otherwise bar the platforms SEPTA seeks to construct.

After SEPTA filed its application, NS and CSX filed answers with the PUC objecting to SEPTA's proposed construction of the platforms. In those answers, NS and CSX allegedly represented that they were entitled to move their freight trains along the Northeast Corridor, and on Amtrak's Harrisburg right of way.[3] They further claimed that SEPTA's proposed platforms would obstruct movement of NS and CSX freight rail traffic along the Northeast Corridor in violation of their right to move freight along that corridor.

Amtrak decided not to formally participate in the underlying case, but instead sent a letter on April 12, 2000 to the PUC arguing that the PUC did not have jurisdiction over Amtrak in the underlying case. In that letter, Amtrak claimed that the PUC lacked jurisdiction to determine the scope of NS and CSX's right to move freight along the Northeast Corridor. Specifically, Amtrak contended that § 4.3 of a Freight Operating Agreement between Amtrak and NS and CSX mandates that any claim or controversy between Amtrak and NS and/or CSX must be pursued as an arbitration proceeding before the National Arbitration Panel.[4]

The April 12 letter further argued that the PUC has no jurisdiction over interstate commerce, and explained that Amtrak acquired the Northeast Corridor pursuant to the Rail Passenger Service Act, *49 U.S.C. § 24101.* However, Amtrak has not taken issue with SEPTA's request to construct the platforms.

Sometime before Amtrak wrote that letter, SEPTA's applications were assigned to Administrative Law Judge Allison K. Turner for hearing. Judge Turner conducted hearings on April 13, 2000, and May 1, 2000. In a June 14, 2000 Recommended Order and Opinion, Judge Turner proposed granting SEPTA permission to build the platforms, provided the parties construct gauntlet tracks at the relevant rail stations. n5 Amtrak alleges that Judge

Turner based her recommendation, in part, upon her acceptance of NS and CSX's position that they possess freight operating rights along the Northeast Corridor. Because Amtrak alleges that NS and CSX do not have such rights, Amtrak's Complaint contends that Judge Turner's recommendation was improper.

On August 1, 2000, SEPTA, NS and CSX filed exceptions to Judge Turner's recommendation, and SEPTA filed a Petition to Reopen the Proceeding to present additional evidence. Then, on October 25, 2000, upon a review of Judge Turner's recommendation, and the August 1, 2000 submissions of SEPTA, NS and CSX, the PUC adopted SEPTA's Petition to Reopen, ordered that Amtrak be joined as an "indispensable party", and remanded the case to Judge Turner. On November 13, 2000, NS filed a Petition for Reconsideration of the PUC's October 25, 2000 Order, but the PUC denied that Petition on December 22, 2000. n6 At this time, the underlying case is once again before Judge Turner.

As explained above, Amtrak's Complaint brings six counts, each one seeking to enjoin the defendants from proceeding with the underlying case. Specifically, Amtrak's first and second counts allege that the arbitration clause of the Freight Operating Agreement governs NS and CSX's assertion of their freight operating rights along the Northeast Corridor. Thus, they contend that the PUC's consideration of that issue violates the arbitration provision of the Freight Operation Agreement between Amtrak and NS and CSX. Accordingly, Amtrak's first and second Counts are brought pursuant to the Federal Arbitration Act, *9 U.S.C. § § 1* et seq. (the "FAA"), and seek declaratory and injunctive relief respectively.

Amtrak's third and fourth counts allege that if the PUC implements Judge Turner's recommendation requiring the installation of gauntlet tracks, that

decision would constitute a "State or other law related to [Amtrak's] rates, routes, or service" in violation of the Rail Passenger Service Act, and would violate the Supremacy Clause of the Constitution. Accordingly, those counts also seek declaratory and injunctive relief respectively.

Amtrak's fifth count alleges that if the PUC requires the parties to install gauntlet tracks, that requirement would amount to an unconstitutional taking of Amtrak's property in violation of the Fifth and Fourteenth Amendments to the Constitution. Thus, the fifth count seeks injunctive relief.

Finally, Amtrak's sixth count generally alleges that Amtrak will suffer immediate and irreparable harm if gauntlet tracks are installed on the Northeast Corridor. Accordingly, the sixth count also seeks injunctive relief.

In light of this background, the Court now turns to defendants' respective Motions to Dismiss.

II. DISCUSSION

Both the NS-CSX and the PUC Motions allege this Court lacks subject matter jurisdiction over this action and move to dismiss plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1). A Rule 12(b)(1) motion may challenge jurisdiction based on the face of the complaint or its existence in fact. See *Mortensen v. First Fed. Savings and Loan Ass'n, 549 F.2d 884, 891 (3rd Cir. 1977)*. Here, the defendants challenge subject matter jurisdiction facially based upon plaintiff's Complaint. Thus, the court must accept as true all well-pleaded allegations in the Complaint and draw reasonable inferences in favor of the plaintiff. See *Mortenson, 549 F.2d at 891*.

The NS-CSX and the PUC Motions move the Court to

dismiss plaintiff's Complaint on other grounds as well. The Court will address each contention in turn.

The NS-CSX Motion contends that this Court lacks subject matter jurisdiction under *28 U.S.C. § 1331* because the Declaratory Judgment Act ("DJA)"), the FAA, the Supremacy Clause, the Commerce Clause and the Takings Clause of the Constitution do not provide an independent basis for jurisdiction in this case[7] Similarly, the PUC contends this Court lacks jurisdiction under the DJA. n8 In response, Amtrak contends that this Court does have jurisdiction under those laws, but first argues that this Court has § 1331 jurisdiction under *28 U.S.C. § 1349*.

On August 1, 2000, SEPTA, NS and CSX filed exceptions to Judge Turner's recommendation, and SEPTA filed a Petition to Reopen the Proceeding to present additional evidence. Then, on October 25, 2000, upon a review of Judge Turner's recommendation, and the August 1, 2000 submissions of SEPTA, NS and CSX, the PUC adopted SEPTA's Petition to Reopen, ordered that Amtrak be joined as an "indispensable party", and remanded the case to Judge Turner. On November 13, 2000, NS filed a Petition for Reconsideration of the PUC's October 25, 2000 Order, but the PUC denied that Petition on December 22, 2000. n6 At this time, the underlying case is once again before Judge Turner.

Section 1349 provides:

The district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock.

28 U.S.C. § 1349.

The Third Circuit, and courts in this district have repeatedly held that Amtrak's status under *28 U.S.C. § 1349* provides an independent basis for federal question jurisdiction under *28 U.S.C. § 1331*. See, e.g., *In re Paoli Railroad Yard PCB Litig. 35 F.3d 717, 738 (3rd Cir. 1994); Boone v. National R.R. Passenger Corp., 1993 U.S. Dist. LEXIS 3973, 1993 WL 93946*, at *2 (E.D.Pa. Mar 30, 1993); *Estate of Zimmerman v. Southeastern Pennsylvania Transp. Authority, 17 F. Supp. 2d 372, 377* (E.D.Pa. Jun 22, 1998). Indeed, "based upon the legislative history of Amtrak's enabling legislation, *45 U.S.C. § 541*, a suit against Amtrak is a federal question irrespective of the underlying cause of action." *Boone, 1993 U.S. Dist. LEXIS 3973*, *3, *1993 WL 93946*, at *2. Consequently, the Court concludes it has subject matter jurisdiction over Amtrak's Complaint, and will not address the defendants' remaining arguments that the Court lacks jurisdiction here.

Next, NS and CSX argue that Amtrak's assertion of jurisdiction under *28 U.S.C. § 1349* is barred by the Anti-Injunction Act, *28 U.S.C. § 2283*, and the Younger abstention doctrine. The Anti-Injunction Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Thus, the plain language of the Anti-Injunction Act indicates that it is only applicable to "proceedings in a State Court", and this case involves an administrative proceeding before the PUC. Indeed, defendants concede that the Supreme Court has historically interpreted the Anti-Injunction Act as inapplicable to state administrative proceedings. See NS-CSX memorandum at 19, (citing *Mississippi Railroad Commission v. Illinois Cent. R. Co., 203 U.S. 335, 341, 51 L. Ed. 209,*

27 S. Ct. 90 (1906)). Moreover, although the Third Circuit has never addressed the issue, every other Circuit that has dealt with it holds that the Anti-Injunction Act does not apply to state administrative proceedings. See *Entergy, Arkansas, Inc. v. Nebraska, 210 F.3d 887, 900 (8th Cir. 2000); Antle, Inc. v. Barbosa, 45 F.3d 1261, 1271 (9th Cir. 1995); SMA Life Assurance Co. v. Sanchez-Pica, 960 F.2d 274, 276 (1st Cir. 1992); Kerr-McGee Chemical Corp. v. City of West Chicago, 914 F.2d 820, 824 (7th Cir. 1990); American Motors Sales Corp. v. Runke, 708 F.2d 202, 204-05 (6th Cir. 1983); Engelman v. Cahn, 425 F.2d 954, 958 (2nd Cir. 1969).*

In addition, the purpose underlying the statute is the prevention of unnecessary friction between state and federal courts, and to maintain the equal dignity of the state and federal courts. See Entergy, Arkansas, Inc., F.3d at 900. Should this Court enjoin the PUC from continuing its proceedings, this Court's order would have no effect on the dignity of state courts, nor could it cause any friction with them.

To the extent Amtrak seeks to enjoin defendants from continuing the PUC proceeding because that proceeding infringes upon Amtrak's right to arbitrate, that argument makes little sense to the Court. As Amtrak's Complaint makes clear, only Amtrak, NS and CSX are parties to the Freight Operating Agreement, but SEPTA and the PUC are not. Thus, this Court cannot ultimately compel arbitration of the case pending before the PUC, and it would therefore be improper for the Court to enjoin the PUC proceedings pursuant to the FAA.[9]

Nonetheless, given the plain language of the Anti-Injunction Act, this Court's determination that enjoining the PUC proceeding would not contravene the purpose of that Act, and the reasoning of courts that hold the

Anti-Injunction Act does not preclude enjoining a state administrative proceeding, the Court concludes that the Anti-Injunction Act is irrelevant in this case.

As mentioned earlier, NS and CSX also argue that the Court should abstain from resolving Amtrak's Complaint under the abstention doctrine first announced in *Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971)*. Under the Younger abstention doctrine, due deference must be paid to state proceedings initiated to resolve controversies that raise significant state issues when federal court intervention is sought. See *Ford Motor Co. v. Insurance Com'r of Com. of Pa., 874 F.2d 926, 931 (3rd Cir. 1989)*. The Younger doctrine is not absolute though, and courts should focus on whether the state proceeding provides an adequate forum for the resolution of the federal claims that have been asserted. See id. The Supreme Court has applied the Younger doctrine to "state administrative proceedings in which important state interests are vindicated, so long as in the course of those proceedings, the federal plaintiff would have a full and fair opportunity to litigate his constitutional claim." *Ohio Civil Rights Com'n v. Dayton Christian Schools, Inc., 477 U.S. 619, 627, 91 L. Ed. 2d 512, 106 S. Ct. 2718 (1986)*.

Accordingly, a federal court should not abstain under Younger unless three elements are present: (1) the ongoing state proceedings are "judicial" in nature; (2) the proceedings implicate important state interests; and (3) the proceedings afford an adequate opportunity to raise the federal claims. See *Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432, 73 L. Ed. 2d 116, 102 S. Ct. 2515 (1982)*. Nevertheless, abstention is an extraordinary and narrow exception to the district court's duty to adjudicate a controversy properly before it. See *Moses H. Cone Memorial Hosp.*

v. Mercury Constr. Corp., 460 U.S. 1, 14, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983).

Here, there is little doubt that the proceedings before the PUC are judicial in nature and involve important state interests i.e. public safety. Additionally, in the proceeding before the PUC, all of the parties are entitled to be represented by counsel, present evidence, object to evidence, present witnesses, and present legal arguments. See 52 PA. ADMINISTRATIVE CODE § 5.243. Additionally, the PUC regularly adjudicates federal issues. See, e.g., *Pittsburgh Tele-Communications, Inc. v. Bell Telephone Company of Pennsylvania, 91 P.U.R.4th 552, 1987 WL 258099,* (Pa.P.U.C. 1987) (applying *47 U.S.C. § 224*, the Pole Attachment Act of 1978). Further, Amtrak has failed to argue that it is unable to raise its federal claims before the PUC. Thus, the Court concludes that the PUC proceedings provide Amtrak an adequate opportunity to present its federal claims, and the elements of the Younger doctrine are satisfied.

However, the Court's conclusion that this case formally satisfies the Younger elements does not end the Court's abstention inquiry, "for Younger abstention is not always appropriate even if its elements are present." *Olde Discount Corp. v. Tupman, 1 F.3d 202, 212 (3rd Cir. 1993).* In Olde Discount, the plaintiff, Olde District Corporation, a securities broker-dealer, sought to enjoin the Delaware securities commissioner from seeking rescission on behalf of two investors who had entered into a predispute arbitration agreement with plaintiff. See *Olde Discount Corp., 1 F.3d at 205.* After the district court declined to abstain under Younger, the Third Circuit upheld the lower court's opinion finding that it had a duty to enforce the parties' arbitration agreement pursuant to the FAA. See *id. at 212-13.* The Court declined to abstain after finding that Olde

Discount had invoked the FAA during the Delaware administrative proceedings to no avail. See *id. at 212.* Accordingly, the Court found that "Delaware's insistence upon the rescission remedy presents just such an immediate potential for irreparable harm to Olde Discount's right under the FAA to an arbitral forum." See *id. at 212.*

Like the plaintiff in Olde Discount, in its April 12, 2000 letter, Amtrak also invoked its arbitration rights before the PUC. Furthermore, despite Amtrak's contention that its dispute with NS and CSX should proceed to arbitration, there is no evidence that the PUC has resolved that issue, and the PUC is continuing its proceedings. Thus, if Amtrak is forced to address its dispute with NS and CSX before the PUC, "it would suffer an immediate, irreparable harm to the federal right established by the FAA" and Younger abstention is therefore inappropriate here. *Olde Discount, 1 F.3d at 213.*

NS, CSX, and the PUC, in their Motions, further contend that this Court should decline to exercise jurisdiction under the DJA pursuant to *Brillhart v. Excess Ins. Co., 316 U.S. 491, 494, 86 L. Ed. 1620, 62 S. Ct. 1173 (1942).* n10 The DJA permits the discretionary exercise of jurisdiction over suits otherwise falling under federal subject matter jurisdiction. See *United States v. Com. of Pa., Dept. of Environmental Resources, 923 F.2d 1071, 1074 (3rd Cir. 1991).* However, the Declaratory Judgment Act "should have a liberal interpretation." *Exxon Corp. v. Federal Trade Commission, 588 F.2d 895, 900 (3rd Cir. 1978).*

When deciding whether to exercise jurisdiction in light of a pending state court proceeding, "the central question is whether the controversy may 'better be settled' in the state court and this may entail

consideration of whether the claims of all parties in interest can satisfactorily be adjudicated in the state court proceeding." *Dept. of Environmental Resources, 923 F.2d at 1075* (construing Brillart). Accordingly, the Third Circuit has set forth four factors this Court should consider in deciding whether to exercise jurisdiction: (1) the likelihood that a federal court declaration will resolve the uncertainty of obligation which gave rise to the controversy; 2) the convenience of the parties; (3) the public interest in settlement of the uncertainty of obligation; and (4) the availability and relative convenience of other remedies.

In the action before the PUC, uncertainty surrounds the obligations of the parties. Contrary to the PUC's contention that there is no conflict between the PUC and Amtrak, Amtrak disputes whether the PUC has the authority to regulate Amtrak's operations. Similarly, Amtrak disputes whether the PUC can compel Amtrak's participation in the administrative proceedings in light of the arbitration agreement between Amtrak and NS and CSX. In the course of this case, the Court will resolve those issues. Upon a review of the remaining factors, the parties' arguments pertaining to each, and the defendants' failure to demonstrate that this case and the case pending before the PUC present the same issues, the Court will not decline to exercise jurisdiction here.[11] To the extent NS and CSX asserts that Amtrak has created a "fictitious controversy between it and NS an CSX", that argument remains unsupported and is inappropriate at this juncture.

The PUC next argues that Amtrak's Complaint against it is not yet ripe for adjudication. More specifically, the PUC contends that no case or controversy can exist here between Amtrak and the PUC until the PUC issues a final decision in the underlying case. In the context of declaratory

judgments, the Third Circuit employs a three step analysis to determine whether a case is ripe for adjudication: 1) the parties' interests; 2) the probable conclusiveness of a judgment; and 3) the practical utility to the parties of rendering a judgment. See *NE Hub Partners, L.P. v. CNG Transmission Corp., 239 F.3d 333, 342 (3rd Cir. 2001).*

The PUC and Amtrak are adverse. First, Amtrak contends that the PUC lacks jurisdiction to decide issues governed under the Freight Operating Agreement, lacks jurisdiction to require improvements over the Northeast Corridor, and lacks jurisdiction to compel Amtrak to participate in the underlying case. See *NE Hub Partners, 239 F.3d at 343* (finding interests of state environmental hearing board adverse to those of permit applicant who claimed state process was preempted by federal law). Moreover, the PUC's focus upon the ultimate result of the underlying case does not take into account "that preemption may operate to spare a party from that very process. In fact, the process itself may give rise to adversity so that an action challenging the process is ripe even before the process concludes. See *id. at 342.*[12]

The next factor the Court considers, conclusiveness, is a short-hand term for whether a declaratory judgment definitively would decide the parties' rights. See *NE Hub Partners, 239 F.3d at 344.* It also addresses the extent to which further factual development of the case would facilitate decision, so as to avoid issuing advisory opinions, or whether the question presented is predominantly legal. See id. Here, a declaratory judgment would definitively decide whether: 1) the PUC may take jurisdiction over NS and CSX operating rights claims; 2) the PUC's jurisdiction over Amtrak's routes and services is preempted; 3) whether NS and CSX and Amtrak are required to arbitrate their claims; and 4)

whether the PUC may compel Amtrak to participate in the underlying case. Additionally, the issues Amtrak raises are predominantly legal, and further factual development is unlikely to be necessary.

The final factor, practical utility, concerns whether declaratory judgment will affect the parties plans of action, and whether withholding judgment would pose a hardship to the parties. See *NE Hub Partners, 239 F.3d at 344.* Should this Court enjoin the PUC from continuing its proceedings, that resolution would certainly be useful to Amtrak. Such a resolution would relieve Amtrak the burden of participating in a time consuming state process, and withholding judgment would subject Amtrak to the hardship of that process. See *NE Hub Partners, 239 F.3d at 343, 345.* Consequently, the Court concludes that Amtrak's Complaint against the PUC is ripe.

Finally, the PUC claims that it is immune from suit under the Eleventh Amendment to the United States Constitution.[13] Amtrak contends that collateral estoppel bars the PUC from litigating the Eleventh Amendment issue now. Collateral estoppel prevents the relitigation of issues that have been decided in a previous action. See *Hawksbill Sea Turtle v. Federal Emergency Management Agency, 126 F.3d 461, 474, 37 V.I. 526 (3rd Cir. 1997).* It "protects litigants from the burden of relitigating an identical issue with the same party or his privy and... promotes judicial economy by preventing needless litigation." See id. (citing *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326, 58 L. Ed. 2d 552, 99 S. Ct. 645 (1979).*

The issue of the PUC's Eleventh Amendment immunity has already been thoroughly litigated between Amtrak and the PUC in this Court. See *National Railroad Passenger Corp. v. Com. of Pennsylvania Public Utility Com'n, 1997 U.S. Dist. LEXIS 14585,*

1997 WL 597963, at *6-10 (E.D.Pa. Sep 15, 1997) (holding that the PUC is not an "arm of the state" and rejecting claim of immunity); *National Railroad Passenger Corp. v. Com. of Pennsylvania Public Utility Com'n, 1998 U.S. Dist. LEXIS 2403, 1998 WL 103377*, at *2-3 (E.D.Pa. Feb. 23, 1998) (holding that decision that PUC was not "arm of the state" was res judicata and denying PUC's Rule 60(b) motion for relief from judgment), appeal dismissed, No. 98-1246 (3rd Cir. Mar. 24, 1999). Upon a review of the above cases, and the factors the Third Circuit requires courts to consider when determining whether collateral estoppel is appropriate,[14] the Court concludes that the PUC is collaterally estopped from raising the Eleventh Amendment issue again in this case.

Accordingly, and for the foregoing reasons, the Court will not dismiss plaintiff's Complaint.

An appropriate Order will follow.

Clarence C. Newcomer, S.J.

ORDER

AND NOW, this 10th day of May, 2001, upon consideration of the defendants' Motions to Dismiss and plaintiff's responses thereto, said Motions are DENIED.

AND IT IS SO ORDERED.

Clarence C. Newcomer, S.J.

Footnotes

[1] SEPTA filed one application on August 5, 1998 for the Baldwin Station. On August 30, 1999, SEPTA filed four other applications for the Chester, Overbrook, Strafford and Radnor stations.

[2] The Northeast Corridor consists of tracks which run between Washington, D.C., and Boston, Massachusetts. All of the relevant stations and rights of way in this case

were conveyed to Amtrak from the Consolidated Rail Corporation ("Conrail") pursuant to the Regional Rail Reorganization Act of 1973 (the "Rail Act"), *45 U.S.C. § 701* et seq.

[3] The Harrisburg right of way runs between Philadelphia, Pennsylvania, and Harrisburg, Pennsylvania.

[4] Section 4.3 of the Freight Operating Agreement, entitled "Arbitration Procedures", provides that:

Except as otherwise provided in this Agreement, any claim or controversy between Amtrak and Conrail concerning the interpretation, application or implementation of this Agreement shall be submitted to binding arbitration in accordance with the Arbitration Agreement dated April 16, 1971 among Amtrak and certain other railroads.

Amtrak contends, and NS and CSX do not dispute at this time, that NS and CSX are successors in interest to Conrail, and are thus bound by the terms of the Freight Operating Agreement.

[5] Gauntlet tracks run parallel to the main set of train tracks and shift a train away from a platform as the train approaches a station.

[6] In a December 29, 2000 Prehearing Order, Judge Turner scheduled a prehearing conference for January 23, 2001 where the parties were ordered to state their positions with respect to the issues on remand.

[7] 28 U.S.C. 1331 provides:

The district courts shall have original

> jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

[8] The PUC's Motion is unclear as to whether the PUC contends the Court lacks jurisdiction under the DJA, 28 U.S.C. 2201, or whether it contends that the Court should exercise its discretion and decline to exercise jurisdiction under that Act. The Court will address both points in its opinion.

[9] It is true that courts must enforce an arbitration agreement "notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 20, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983).* However, Amtrak does not merely ask this Court to enforce the Freight Operating Agreement, it also asks this Court to enjoin the defendants from proceeding with the PUC proceeding. See Amtrak Complaint, at 18. Thus, because SEPTA is not a party to the Freight Operating Agreement, the Court cannot preclude SEPTA from going forward with its application before the PUC. See *Moses H. Cone, 460 U.S. at 20* (explaining that federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement, and concluding that plaintiff's claims against two defendants, only one of which was bound by an arbitration agreement, should be resolved separately–one in arbitration, and the other (if at all) in state-court litigation).

[10] The DJA provides:

> In a case of actual controversy within its jurisdiction, ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other

legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201.

[11] In its Memorandum in support of its Motion, the PUC also argues that Amtrak has failed to exhaust its Administrative Remedies. However, the PUC seemingly combines this argument with its contention that this action and the PUC proceeding involve the same issues and claims, and is unclear and undeveloped. As the PUC acknowledges, dismissal of a federal declaratory action in favor of a parallel state proceeding is favored only if the state proceeding "presents the same issues, not governed by federal law, between the same parties." See *Brillhart, 316 U.S. at 495.* This case does not involve the same issues, and does involve federal statutory and constitutional law.

[12] The PUC does not raise the ripeness issue with respect to any other defendant and instead only argues that this case is not ripe until the PUC issues a final decision. Accordingly, the Court will limit its discussion to whether Amtrak's Complaint against the PUC is ripe.

[13] The Eleventh Amendment provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

[14] See Hawksbill Sea Turtle, F.3d at 474.

CIVIL ACTION NO. 86-5357

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATIONAL RAILROAD PASSENGER CORPORATION,
Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA PUBLIC UTILITY COMMISSION and
TOWNSHIP OF TREDYFFRIN,
Defendants.

September 15, 1997, Decided

September 16, 1997, Filed

COUNSEL:
For NATIONAL RAILROAD PASSENGER CORP: Dennis M. Moore, Washington, D.C.

For NATIONAL RAILROAD PASSENGER CORP: James M. Brogan, Piper & Marbury L.L.P., Philadelphia, PA.

For TWP. OF TREDYFFRIM: WILLIAM H. LAMB, ESQ, LAMB, WINDLE & MCERLANE, P.C., John D. Snyder, Esq, Vincent M. Pompo, Esq, WEST CHESTER, PA.

For PA. PUBLIC UTILITY COMMISSION: JOHN J. GALLAGHER, ESQ, RICHARD S. HERSKOVITZ, ESQ, PA. PUBLIC UTILITY COMMISSION, David A. Salapa, Susan D. Colwell, HARRISBURG, PA.

JUDGES:
Clarence C. Newcomer, J.

OPINIONBY:
Clarence C. Newcomer

OPINION:

MEMORANDUM

Before this Court are National Railroad Passenger Corporation's Motion for Modification of this Court's Order of January 2, 1991, and Pennsylvania Public Utility Commission's response thereto, and the Township of Tredyffrin's response thereto, and plaintiff's reply thereto. For the following. reasons, the Court will deny plaintiff's motion.

Also before this Court are Pennsylvania Public Utility Commission's Motion for Dissolution of this Court's Injunction, and National Railroad Passenger Corporation's response thereto, and, Pennsylvania Public Utility Commission's reply thereto. For the following reasons, the Court will deny defendant's motion.

Also before this Court are National Railroad Passenger Corporation's Conditional Motion for Leave to Amend Complaint, and Pennsylvania Public Utility Commission's response thereto. For the following reasons, the Court will deny plaintiff's motion.

I. Background

This case was originally initiated by a complaint filed by the National Railroad Passenger Corporation ("Amtrak"), on September 10, 1986, seeking equitable and declaratory relief to prevent the enforcement of defendant Pennsylvania Public Utility Commission's ("Commission") order dated June 13, 1986, directing Amtrak to pay approximately twenty percent of the cost of replacing a bridge situated in Tredyffrin Township,

Pennsylvania. The Commission order which was being challenged by Amtrak allocated the remaining eighty percent of the cost to defendant Tredyffrin Township which, in turn, would be reimbursed by the Commonwealth of Pennsylvania. The Commission also ordered Amtrak to assume certain maintenance costs of the proposed new bridge and adjoining pedestrian walkway.

On June 30, 1987 this Court entered an Order permanently enjoining the Commission from assessing costs against Amtrak for the maintenance of the Cassatt Avenue bridge structure. National Railroad Passenger Corp. v. Commonwealth of Pennsylvania Public Utility Comm'n, 665 F. Supp. 402 (E.D. Pa. 1987), aff'd, 848 F.2d 436 (3d Cir. 1988), cert. denied, 488 U.S. 893, 109 S. Ct. 231, 102 L. Ed. 2d 220 (1988). Reviewing the legislative history of Amtrak's tax exemption, as codified at 45 U.S.C. § 546b, n1 this Court determined that the statute was designed to "guarantee Amtrak's fiscal integrity, and indeed its survival." 655 F. Supp at 411. The Act creating Amtrak was found to demonstrate "a federal commitment to maintain and improve rail passenger service, federal controls over Amtrak management and operations and federal financial support for Amtrak." Id.

Against this backdrop, this Court decided that it "would be inappropriate to undermine those goals through the too stingy construction of the exemption offered by defendants." Id. Thus the Court found that "Title 45 of the United States Code section 546b exempts Amtrak from the payment of special assessments such as that imposed by the [Commission]." Id. at 412. Accordingly, the Commission was permanently enjoined from assessing Amtrak for costs associated with the design, construction or maintenance of the Cassatt Avenue bridge.

Despite this permanent injunction, on July 3, 1990, the commission entered an order imposing on Amtrak the costs of maintaining the substructure and superstructure of the Cassatt Avenue Bridge. Amtrak subsequently filed a motion to enforce the permanent injunction previously issued in the Order of June 30, 1990. By Order of January 2, 1991, this Court permanently enjoined the Commission from imposing on Amtrak any costs of maintenance of the Cassatt Avenue Bridge structure under its July 3, 1990 Order. National Railroad Passenger Corporation v. Commonwealth of Pennsylvania Public Utility Commission, 1991 U.S. Dist. LEXIS 114, 1991 WL 998 (E.D. Pa. 1991).

Amtrak presently moves this Court to modify this Court's Order of January 2, 1991. By this motion, Amtrak requests this Court to broaden the permanent injunction to include any assessment of responsibility to Amtrak for the repair, maintenance or replacement of highway bridges in the Commonwealth of Pennsylvania. Amtrak argues that a recent decision of the Commonwealth Court in City of Philadelphia v. Pennsylvania Public Utility Comm'n, 676 A.2d 1298 (Pa. Cmwlth.), petition for allowance denied, 546 Pa. 657, 684 A.2d 558, (1996), cert. denied, 117 S. Ct. 1334, 137 L. Ed. 2d 494 (1997), n2 and statements made by the Commission that it is bound by the decision of the Commonwealth Court, create the imminent prospect that the Commission will attempt to impose responsibility for bridge maintenance on Amtrak in the still-ongoing Commission proceedings concerning the Cassatt Avenue Bridge and in numerous other Commission proceedings involving highway bridges over Amtrak's right-of-way. Amtrak argues that modification of this Court's Order of January 2, 1991 is therefore necessary to protect Amtrak's rights under federal law and to fulfill the original purpose of this Court's declaratory judgment and injunctions.

Defendants, of course, oppose any modification of this Court's Order of January 2, 1991. Defendants argue that the permanent injunction entered on January 2, 1991 should not be entered because (1) there is no live case or controversy, (2) the Commission has not violated this Court's January 2, 1991 order, (3) a broadening of this Court's order would violate the due process rights of other parties who have not been joined, and (4) Amtrak improperly seeks to expand the injunction beyond the intent of the statute.

The Commission, after responding to Amtrak's motion for modification, filed its own motion to dissolve the permanent injunction. In support of its motion, the Commission contends that the permanent injunction entered herein was based on this Court's interpretation of 49 U.S.C. § 24301(l) and that this statute was enacted pursuant to the Interstate Commerce Clause of the United States Constitution. U.S. Const. Art. I, § 8, cl. 3. The Commission notes that in 1996, the United States Supreme Court held that Congress cannot abrogate a state's Eleventh Amendment immunity from suit in federal court under the authority of the Interstate Commerce Clause. Seminole Tribe v. Florida, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996). Without Congressional abrogation of the Eleventh Amendment immunity, the Commission argues that a state cannot be sued in federal court unless it consents to such a suit. The Commission correctly notes that Pennsylvania has not consented to be sued in the federal courts.

Making a critical leap of logic, the Commission argues that it is entitled to Eleventh Amendment immunity to the same extent as Pennsylvania because it is an "arm" or "alter ego" of Pennsylvania. As such, the Commission argues that this Court cannot modify or maintain the permanent injunction entered against it because there has been no consent to suit in federal

court and Congress has not validly abrogated its Eleventh Immunity under the Interstate Commerce Clause. n3

In response, Amtrak rejoins that the Commission is not entitled to Eleventh Amendment immunity. Amtrak argues that since it is a federal entity for the purposes of tax immunity, the Commission cannot rely on the Eleventh Amendment for protection from suit in federal court. Amtrak also contends that the Commission is not an arm or alter-ego of Pennsylvania, and as such, the Commission is not entitled to Eleventh Amendment immunity.

In addition, Amtrak argues that if this Court finds that the Eleventh Amendment does bar suit against the Commission, it should grant its conditional motion for leave to amend the complaint so that Amtrak can amend the complaint to name the Commissioners under the doctrine of Ex Parte Young. If the complaint was amended to add the Commissioners, Amtrak argues that the Commission's Eleventh Amendment argument would be moot because the Eleventh Amendment does not bar suit against state officials when the suit seeks only prospective relief to end a continuing violation of federal law.

II. Discussion

A. Eleventh Amendment Immunity

Because the Commission's Eleventh Amendment argument is necessarily a threshold question in that it challenges this Court's authority to modify, or for that matter, even maintain the current permanent injunction, the Court first examines whether the Commission is entitled to the protection of the Eleventh Amendment, and thus whether the Commission's motion to dissolve the permanent injunction should be granted.

1. Is Amtrak a Federal Entity?

As stated above, Amtrak argues that the Commission cannot use the Eleventh Amendment as a shield to protect it from instant law suit and injunction because the Eleventh Amendment has never barred federal court suits by the United States government against a state. From this rule of law, Amtrak reasons that it can sue the Commission in federal court because it is a federal entity, and thus not subject to the bar of the Eleventh Amendment. The Commission rejoins that Amtrak's argument must fail because Amtrak is not a federal entity.

It is well established that federal court suits brought by the United States against states are not barred by the Eleventh Amendment. Employees of Dept. of Pub. Health and Welfare v. Dept. of Pub. Health and Welfare, 411 U.S. 279, 286, 93 S. Ct. 1614, 36 L. Ed. 2d 251 (1973); United States v. Mississippi, 380 U.S. 128, 140, 85 S. Ct. 808, 13 L. Ed. 2d 717 (1965). Citing Dept. of Public Health and Mississippi, Amtrak argues that federal entities are not subject to the Eleventh Amendment bar of bringing suit in federal court against a state. Although Amtrak's position seems logical, neither the Dept. of Public Health nor Mississippi do not state explicitly that a federal entity enjoys the same freedom to bring suit in federal court against a state. Indeed, Amtrak does not provide this Court with any authority to support its position. Nonetheless, for the purposes of this motion, the Court will assume that federal entities can sue states in federal court to the same extent that the United States government can be sue in federal court.

However, in order to be entitled to this same freedom from the bar of the Eleventh Amendment, Amtrak must prove that it is a federal entity. This Amtrak cannot do. The clear and unequivocal language of 49 U.S.C. § 24301(a)(3) states that Amtrak "is not a

department, agency or instrumentality of the United States Government." n4 Thus, it is evident to this Court that Congress did not intend to extend department, agency or instrumentality status to Amtrak on a wholesale basis. Based on the explicit language of § 24301(a)(3), Amtrak cannot argue that it is a federal entity for the purposes of avoiding the bar of the Eleventh Amendment.

In an attempt to circumscribe the language of § 24301(a)(3), Amtrak relies on the Supreme Court's decision in Lebron v. National Railroad Passenger Corporation, 513 U.S. 374, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1995), wherein the Court concluded that Amtrak is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution. In that case, plaintiff Lebron filed suit, claiming that Amtrak had violated his First Amendment rights by rejecting a display for an Amtrak billboard because of its political nature. The district court ruled that Amtrak was a government actor for First Amendment purposes because of Amtrak's close ties with the federal government. The Court of Appeals for the Second Circuit reversed, noting that Amtrak was, by the terms of the legislation that created it, not a government entity, and concluding that the government was not so involved with Amtrak that the latter's decisions could be considered federal action.

In its decision in Lebron, the Supreme Court began its analysis by addressing whether the clear language of 45 U.S.C. § 541, the predecessor statute to 49 U.S.C. § 24301(a)(3), was dispositive of Amtrak's agency or instrumentality status. The Supreme Court found that the status ascribed to Amtrak was not dispositive of Amtrak's status as a government entity for the purposes of determining the constitutional rights of citizens

affected by its action. 115 S. Ct. at 971. The Court, however, did state that:

> Section 541 is assuredly dispositive of Amtrak's status as a Government entity for purposes of matters that are within Congress' control–for example, whether it is subject to statutes that impose obligations or confer powers upon Government entities . . . . And even beyond that, we think § 541 can suffice to deprive Amtrak of all those inherent powers and immunities of Government agencies that it is within the power of Congress to eliminate. We have no doubt, for example, that the statutory disavowal of Amtrak's agency status deprives Amtrak of sovereign immunity from suit, . . . and of the ordinarily presumed power of Government agencies authorized to incur obligations to pledge the credit of the United States . . . .

Id. Under the Supreme Court's interpretation of § 541 (now § 24301(a)), Amtrak's status as an agency or instrumentality of the United States depends on the facts and circumstances of the case and § 24301(a)'s language is not always dispositive of this inquiry. The question which is posited to this Court at this point is what status should Amtrak be deemed to have under the facts of this case.

Amtrak argues that although Congress characterized Amtrak's status as "not a department, agency, or instrumentality of the United States Government" which "suffice[s] to deprive all of those inherent powers and immunities of Government agencies that it is within the power of Congress to eliminate," id., in 49 U.S.C. § 24301(l) Congress explicitly reserved for Amtrak an immunity "from a tax or fee imposed by a State, a political subdivision of a State, or a local taxing authority and levied on it after September 30, 1981" and

described that immunity in the legislative history as being "to the same extent the United States is exempt from the payment of such taxes and other fees." n5 From its review of the reasoning in Lebron and the language of and legislative history of § 24301(l), Amtrak correctly concludes that Congress expressly reserved for Amtrak the immunity from state and local taxes and other fees to the same extent that the United States is exempt. Because Amtrak has been given immunity from state and local taxes and other fees, Amtrak contends that it "is an entity of the federal government for purposes of enforcing its exemption from state and local taxes and is not subject to the Eleventh Amendment." (Amtrak's Br. Opp'n Def.'s Mot. Dissolve at 7). It is at this point that Amtrak's reasoning loses its logical consistency.

While it may be true that Congress intended to extend to Amtrak the same immunities from state taxation that the federal government enjoys, it does not follow that Congress therefore intended to make Amtrak a federal entity for the purpose of denying Eleventh Amendment rights to states. Although there exists statutory language that extends the federal government's immunity from state and local taxes to Amtrak, no such statutory language exists that indicates that Congress intended Amtrak to be considered a federal entity for the purposes of the Eleventh Amendment. Indeed, statutory language exists that indicates that Congress itself believed that Amtrak was not a federal entity for the purposes of the Eleventh Amendment.

Section 24301(l) provides that "the district courts of the United States have original jurisdiction over a civil action Amtrak brings to enforce this subsection and may grant equitable or declaratory relief requested by Amtrak." 49 U.S.C. § 24301(l)(2). If Congress had

actually decided that Amtrak was a federal entity for the purposes of the Eleventh Amendment, then the language of § 24301(l)(2) would be superfluous. However, if the Rail Passenger Service Act does not make Amtrak a federal entity for the purposes of the Eleventh Amendment, as this Court finds today, then the language in § 24301(l)(2) is not surplusage.

Instead, § 24301(l)(2) becomes critically important under this statutory scheme because it is this language, together with the language in subsection(l)(1), that evinces Congress' intent to abrogate state immunity under the Eleventh Amendment. n6 Because Amtrak is not a federal entity for the purposes of Eleventh Amendment immunity, Congress enacted the language of § 24301(l)(2) to ensure that states could not assert the defense of sovereign immunity in federal court. In addition, there was nothing to prevent Congress from legislating that Amtrak should be considered a federal entity for the purposes of the Eleventh Amendment if that is what Congress actually intended to do.

As the statutory language and legislative history demonstrates, it is probable that Congress intended Amtrak not to be an agency, entity or instrumentality of the United States government for the purposes of extending those privileges and immunities which are only available to the United States, except where Congress explicitly stated that Amtrak should be so treated. Thus, the Court rejects Amtrak's argument that it is a federal entity for the purposes of Eleventh Amendment immunity.

2. Is the Commission an Arm or Alter Ego of the Commonwealth?

Amtrak next argues that the Commission can not raise the shield of the Eleventh Amendment because it is

not an arm or alter ego of the state. The Commission, on the other hand, argues that it is entitled to be protected by the Commonwealth's sovereign immunity because it is an arm or alter ego of the state.

In Christy v. Pennsylvania Turnpike Comm'n, 54 F.3d 1140, 1144 (3d Cir. 1995), the Third Circuit restated the criteria to be considered in determining whether an entity is an alter ego or arm of the state for the purposes of the Eleventh Amendment. The test entails three separate inquiries:

> (1) whether, in the event the plaintiff prevails, the payment of the judgment would come from the state (this includes three considerations: whether the payment will come from the state's treasury, whether the agency has sufficient funds to satisfy the judgment, and whether the sovereign has immunized itself from responsibility for the agency's debts); (2) the status of the agency under state law (this includes four considerations: how state law treats the agency generally, whether the agency is separately incorporated, whether the agency can sue and be sued in its own right, and whether it is immune from state taxation); and (3) what degree of autonomy the agency enjoys.

Id. at 1144-45 (citations omitted).

The party asserting Eleventh Amendment immunity bears the burden of proving its applicability. Id. at 1144 (citing ITSI TV Productions, Inc. v. Agricultural Associations, 3 F.3d 1289 (9th Cir. 1993)). The Third Circuit has stated that "because Eleventh Amendment immunity can be expressly waived by a party, or forfeited through non-assertion, it does not implicate federal matter jurisdiction in the ordinary sense." Id. Agreeing with the ITSI TV court, the Third Circuit has

held that "'whatever its jurisdictional attributes, [Eleventh Amendment immunity] should be treated as an affirmative defense[,]'" and "'like any other such defense, that which is promised by the Eleventh Amendment must be proved by the party that asserts it and would benefit from its acceptance.'" Id. (quoting ITSI TV, 3 F.3d at 1291). Thus, in this case, the commission is charged with the obligation to prove its entitlement to the defense of sovereign immunity.

"Although no single factor is dispositive of the Eleventh Amendment inquiry, the 'most important' factor is whether a judgment against the entity in question . . . would be paid out of the state treasury." Christy, 54 F.3d at 1145. Indeed, the Supreme Court has noted that: "The vast majority of Circuits have concluded that the state treasury factor is the most important factor to be considered and, in practice, have generally accorded this factor dispositive weight." Hess v. Port Authority Trans-Hudson Corporation, 513 U.S. 30, 115 S. Ct. 394, 404, 130 L. Ed. 2d 245 (1994) (citations omitted).

Pursuant to the Commission's statutory authority, the annual operating budget of the Commission is derived from a percentage of the "total gross intrastate operating revenues of the public utilities under its jurisdiction for the preceding calendar year." 66 Pa. Cons. Stat. § 510(a). The assessments against public utilities are paid into the General Fund of the State Treasury. 66 Pa. Cons. Stat. § 511(a). The funds, however, are then specifically earmarked for redistribution to the Commission and are not available for other uses:

All such assessments and fees, having been advanced by public utilities for the purpose of defraying the cost of administering this part, shall be held in trust solely for

that purpose, and shall be earmarked for the use of and annually appropriated to, the commission for disbursement solely for that purpose.

66 Pa. Cons. Stat. § 511(b). Beyond these assessments the Commission may also apply for and use federal funds pursuant to the National Energy Act subject to appropriation by the General Assembly. 66 Pa. Cons. Stat. § 511.1. In addition, the Commission can obtain funds by fees for filing, record copying and instrument testing. 66 Pa. Cons. Stat. § 317.

A review of the sources for the Commission's funding indicates that funding for the Commission is derived from an annual assessment on the revenues of public utilities, and is not obtained from State Treasury funds that could otherwise be used to satisfy expenses or obligations. Additional funds for the Commission are derived from fees paid for filing, record copying and instrument testing, which is another source of funding which does not come directly from the State Treasury. These sources of funding lend strong support to the conclusion that the Commission is not the alter ego of Pennsylvania.

The Commission argues that it has no independent authority to raise funds and that those funds necessary for the operation of the Commission must come through the budget process. In essence, the Commission argues that payment for a judgment against it would come from State Treasury because the budget of the Commission is subject to legislative approval. This argument, however, is without merit. Indeed, in Christy, the Third Circuit stated that "state control over an entity's ability to obtain funds is inadequate to demonstrate state ownership of the funds where the state is not shown to have a financial interest that would be directly and adversely affected by the diminution of the funds in

question." Christy, 54 F.3d at 1146. Here, the state's authority to review and approve the Commission's budget under 66 Pa. Cons. Stat. § 510(a) falls short of indicating state ownership of the funds obtained through the assessments of public utilities and the fees raised by the Commission. The argument that the state controls the Commission's ability to obtain funds does not demonstrate that the state has a financial interest that would be directly and adversely affected by the Commission having to satisfy a judgment against it.

The Commission also has not demonstrated that it would not have enough money to satisfy a potential judgment against it. Failure to offer any evidence on this issue is fatal to the Commission's argument that it could not satisfy a judgment. In Christy, the Court stated that "since the [Turnpike] Commission bears the burden of proving its entitlement to Eleventh Amendment immunity, the [Turnpike] Commission's failure to provide pertinent information regarding its ability, or lack thereof, to satisfy a potential judgment against it simply means that the [Turnpike] Commission has failed to satisfy its burden of proof on this important question." Id. at 1146. The same reasoning equally applies in this case. Because the Commission has not offered any evidence with respect to this issue, it has failed to satisfy its burden of proof on this important question.

In addition, the Commission has not demonstrated that the State Treasury is responsible for paying any obligations incurred by the Commission. The Commission, in its brief, merely states that the Commonwealth would be responsible for such obligations without providing this Court with any affirmative support for this proposition. Thus, the Court will not rely on this unsubstantiated claim by the Commission. See id. at 1147 (holding that "the

[Turnpike] Commission has failed to establish that Pennsylvania is under any affirmative obligation to pay the Commission's unassumed liabilities"). Although states "might well choose to appropriate money to the [Turnpike] Commission to enable it to meet a shortfall caused by an adverse judgment, such voluntary payments by a state simply 'do not trigger [Eleventh Amendment] immunity'" Id. (quoting Fitchik v. New Jersey Transit Rail Operations, Inc., 873 F.2d 655, 661 (3d Cir. 1989)).

The Commission has failed to establish that (1) a judgment against it would be the equivalent to a judgment against the Treasury of the Commonwealth; (2) the Commission lacks financial resources to satisfy a judgment against it; or (3) Pennsylvania would be under any obligation to satisfy a judgment against the Commission. Thus, the Court finds that the funding factor, the most important factor, weighs heavily in support of the finding that the Commission is not an arm or alter ego of the Commonwealth and does not enjoy Eleventh Amendment immunity from suit in federal court.

The second factor that must be considered in determining whether the Commission is an arm or alter ego of the Commonwealth of Pennsylvania is the status of the Commission under Pennsylvania law. Christy, 54 F.3d at 1144. The goal here is to "determine whether Pennsylvania law treats the [Commission] as an independent entity, or as a surrogate for the state." Id. at 662. The Commission cites to cases wherein the courts of Pennsylvania have held that the Commission is an arm of the legislature whose members perform legislative work delegated by the General Assembly. See Lacy v. East Broad Top RR & Coal Co., 168 Pa. Super. 351, 77 A.2d 706 (1951); Commonwealth ex rel. v. Benn, 284 Pa. 421, 131 A. 253 (1925). In contrast, Amtrak has

not provided the Court with any case law which would counter the position of the cases that were produced by the Commission. Thus, the Court finds that the Commission's cases lend support to its argument that under Pennsylvania law, the Commission is a surrogate of the state.

In addition to these cases, the Commission alleges that under Pennsylvania law it is an arm of the state because it is immune from suit in state court pursuant to 42 Pa. Cons. Stat. § 8522. In Christy, the Circuit noted that "the Pennsylvania sovereign immunity statute itself is some evidence of the [Turnpike] Commission's status before the law of Pennsylvania. And as some evidence of the [Turnpike] Commission's status at state law, it is relevant to our Eleventh Amendment inquiry." 54 F.3d 1140 at 1149 n.9. In this case, the fact that the Commission has been given immunity from suit in state court is relevant to the Eleventh Amendment immunity inquiry and weighs in favor of finding that under the law of Pennsylvania, the Commission is an agency. However, as the Christy court noted the state's grant of sovereign immunity to an agency "is far from determinative of [the Eleventh Amendment] inquiry." Id.

Amtrak, in support of its argument that the Commission is not an agency under the eyes of Pennsylvania law, states that the Commission was established as an "independent administrative commission." 66 Pa. Cons. Stat. § 301(a). While it notes that this term is undefined by statute, Amtrak argues that this language clearly indicates a legislative intent to establish an entity that is separate and distinct from agencies that are intended to be arms of the state. Although this language may evince a legislative intent to establish an agency that it not an arm of the state, the actual status that the Commission is afforded under state law indicates that the Commission is probably

most properly characterized as an arm of the state under state law. Thus, the Court finds that "status under state law" factor weighs in favor of finding Eleventh Amendment immunity.

The third factor requires this Court to determine what degree of autonomy the agency enjoys. Id. at 1144. To begin, the Court notes that the Commission's membership is controlled by the executive and legislative branches of the Commonwealth. 66 Pa. Cons. Stat. § 301(a) (the five commissioners are appointed by the Governor, with the advice and consent of the members of the Senate). In addition, the Governor appoints the Chairman of the Commission. 66 Pa. Cons. Stat. § 301(a). State authority over the appointment of the Commission members lends support to a finding of sovereignty. Id. at 1149.

In addition to this the lack of autonomy, other information indicates that the Commission may not be autonomous. Indeed, the Commission cannot enter into contracts in its own name, it cannot purchase or own property, and has a limited source of independent funding.

Nonetheless, the Commission also possesses a great deal of autonomy in certain areas. The Commission describes itself as an "independent agency with complete autonomy over its operations." (Comm'n Br. Supp. Mot. Dissolve at 6) (emphasis added). As acknowledged by the Commission, it possesses broad regulatory authority to conduct its day-to-day business. See 66 Pa. Cons. Stat. § 501. Moreover, the Commission admits "that the Commissioners are not directly answerable to the Governor and that neither the Governor or the members of the General Assembly can order the [Commission] to adjudicate a case a certain way . . . ." (Reply Br. at 7). However, the Commission argues that such autonomy is needed to provide the

parties, who come before it, with due process. Nevertheless, the Commission itself admits that it has certain attributes that would support a finding that it is autonomous from the state.

Although the Commission is autonomous in many respects, the Court finds that "the significant control the Commonwealth exercises through the power to appoint the commissioners weighs slightly in favor of [Commission] immunity from suit." Christy, 54 F.3d at 1149 (citation omitted).

Having carefully considered the three factors above, the Court must now consider the three factors in their totality. Id. at 1150. To begin, the most important factor, funding, weighs heavily against the Commission. In contrast, the second factor, "status under state law," weighs in favor of the Commission. The third factor, autonomy, weighs ever so slightly in favor of the Commission. If the balancing was as simplistic as counting the number of factors that weigh in favor of one party, then the result in this case would be simple - the Commission would prevail because two factors weigh in its favor. However, the balancing test required by Eleventh Amendment jurisprudence is not so simplistic.

As stated above, the first factor, funding, is the most important factor, and thus it is given the greatest weight. "The special emphasis . . . placed upon the funding factor is supported by the Eleventh Amendment's central goal: the prevention of federal court judgments that must be paid out of the State's treasury." Id. at 1145 (citation omitted). In this regard, the Supreme Court has noted that this factor is given dispositive weight by most Circuit Courts. Hess, 115 S. Ct. 394, 130 L. Ed. 2d 245 at 261. Indeed, when the state is not required to pay the obligations of the entity in question, "the Eleventh

Amendment's core concern is not implicated." 130 L. Ed. 2d 245 at 262.

In this case, the funding factor weighs heavily against the Commission. The Commission has been unable to satisfy its burden that (1) a judgment against it would be equivalent to a judgment against the Treasury of the Commonwealth; (2) the Commission lacks financial resources to satisfy a judgment against it; or (3) Pennsylvania would be under any obligation to satisfy a judgment against the Commission. Thus, the core concern of the Eleventh Amendment is not implicated by the facts of this case.

Because the core concern of the Eleventh Amendment is not implicated herein, the two remaining factors must weigh so heavily in the Commission's favor to justify a finding of Eleventh Amendment immunity. However, the second and third factors, although weighing in favor of the Commission, simply do not tip the scales in favor of a finding, of sovereign immunity for the Commission. Indeed, this Court has determined that the third factor only slightly weighs in the Commission's favor because the Commission is autonomous in much of its operations. Moreover, although the second factor weighs more decidedly in the Commission's favor, this factor is not without its ambiguities. Consequently, the Court finds that the balance of factors is struck against a finding that the Commission is entitled to be protected by the state's cloak of sovereign immunity. Because the Commission cannot raise the Eleventh Amendment as bar to suit in this Court, the Commission's motion to dissolve the permanent injunction is denied.

B. Conditional Motion for Leave to Amend

In response to the Commission's motion to dissolve, Amtrak conditionally moves for leave to amend the

complaint if the Court grants the motion of the Commission. Because the Court has denied the Commission's motion to dissolve, the Court denies Amtrak's conditional motion for leave to amend complaint as moot. n7

C. Amtrak's Motion for Modification of the Permanent Injunction

Disposing of the Commission's motion to dissolve and Amtrak's conditional motion to amend, the Court now turns its attention to the motion which gave rise to the instant dispute between the parties – the motion of Amtrak for modification of this Court's Order of January 2, 1991.

It is well established that a court that has entered an injunction has continuing jurisdiction over the case to oversee implementation of the injunction. United States v. Swift & Co., 286 U.S. 106, 114, 52 S. Ct. 460, 76 L. Ed. 999 (1932). The court further has inherent power to modify the injunction. Id. In this light, the Third Circuit has held that "the hornbook rule regarding plaintiff's request for modification of injunctive relief is that 'modification is proper if the original purposes of the injunction are not being fulfilled in any material respect.'" United States v. Local 560 (I.B.T.), 974 F.2d 315, 331 (3d Cir. 1992) (quoting Charles Wright and Arthur Miller, 11 Federal Practice and Procedure, § 2781, at 605 (1973)).

The Supreme Court has held that the appropriate test to be used to determine whether an injunction should be modified is "whether 'time and experience have demonstrated' that 'the decree has failed to accomplish' its objectives." Id. at 332 (citing United States v. United Shoe Machinery Corp., 391 U.S. 244, 249, 88 S. Ct. 1496, 1500, 20 L. Ed. 2d 562 (1968)). The Supreme Court also noted that each consideration of the

request for modification "must be based upon the specific facts and circumstances that are presented." Id. Thus, the question presented to this Court is whether Amtrak has demonstrated that the injunction has failed to accomplish its objectives.

In this regard, Amtrak argues that "the original purpose of the Court's injunction was to effectuate the Congressional intent to protect Amtrak from the imposition of state and local taxes and fees by prohibiting the [Commission] from imposing on Amtrak assessments for bridge maintenance and repair." (Amtrak's Br. Supp. Mot. Modification at 15). Amtrak contends that although the terms of the injunction were limited to the Cassatt Avenue Bridge, this Court's original opinion and the Third Circuit's affirmance of that decision make it clear that any imposition on Amtrak or responsibility for bridge maintenance is unlawful.

Amtrak contends that the objectives of this Court's permanent injunction are not being fulfilled based on the conduct of the Commission in the aftermath of the Commonwealth Court's decision in City of Philadelphia v. Pennsylvania Public Utility Comm'n, supra. In the City of Philadelphia, the Commonwealth Court rejected this Court's and the Third Circuit's interpretation of § 24301(l). In its view, § 24301(l) does not preclude the Commission from assessing costs against Amtrak for the maintenance of highway-roadway crossings. Accordingly, the Commonwealth Court ordered the Commission to make a new allocation of costs considering all parties, including Amtrak. The Commission appealed this order. The Supreme Court of Pennsylvania denied the Commission's appeal.

Because the Commission was presented with what it felt were two irreconcilable orders – one from this Court and one from the Commonwealth Court, it filed a

writ of petition for certiorari with the Supreme Court of the United States. The Supreme Court denied the petition. However, in this petition, the Commission stated that it agreed with the Commonwealth Court's interpretation of § 24301(l). Based on these statements, Amtrak argues that the Commission's "stated intent to impose responsibility for bridge maintenance on Amtrak, pursuant to the decisions of the Pennsylvania Commonwealth Court, is a clear violation of this Court's prior judgment and orders." (Amtrak's Br. Supp. Mot. Modification at 16). Amtrak argues that modification of this Court's Order of January 2, 1991 is therefore necessary to protect Amtrak's rights under federal law and to fulfill the original purpose of this Court's declaratory judgment and permanent injunction. n8

Despite Amtrak's arguments to the contrary, the Court concludes that Amtrak has not demonstrated that the purposes of the permanent injunction entered on January 2, 1991 are not being fulfilled. Amtrak has failed to persuade the Court that the Commission has violated the January 2, 1991 order in either letter or spirit. The result of the case before this Court is that the Commission has repeatedly recognized that the federal courts barred the Commission assignment of any costs or responsibilities for replacement or maintenance of a highway bridge over an Amtrak right-of-way. Moreover, the Commission has not allocated any costs or responsibilities on highway structures crossings above Amtrak facilities to Amtrak. In sum, Amtrak cannot point to any actual incidents, wherein the Commission violated the permanent injunction issued by this Court on January 2, 1991.

Amtrak's claim that it is imminent that the Commission will violate either the letter or spirit of this Court's injunction is based on pure speculation and conjecture. Amtrak merely speculates that the

Commission will violate the purposes of the permanent injunction because the Commission has stated in its petition for a writ of certiorari that it agreed with the Commonwealth Court's interpretation of § 24301(l). n9 The speculative nature of Amtrak's contention is best demonstrated by the fact that a person could argue with equal persuasiveness that the Commission will violate the order of the Commonwealth Court because of the permanent injunction entered in this case. Amtrak, as well as this Court, simply cannot divine what the Commission will do in the face of these competing orders. However, speculation as to what the Commission will do in light of these competing orders is insufficient to establish an imminent threat of harm against Amtrak.

As stated above, Amtrak has not pointed to any evidence which would indicate that the purposes of the Court's permanent injunction are not being fulfilled. In addition, Amtrak has not demonstrated how the Commission has actually violated the terms of the Order of January 2, 1991. Without its speculative arguments, Amtrak simply cannot demonstrate that the letter or purposes of this Court's Order of January 2, 1991 are not being fulfilled. As such, Amtrak is not entitled to a modification of this Court's Order of January 2, 1991. n10

III. Conclusion

Accordingly, for the foregoing reasons, the Commission's motion for dissolution of this Court's injunction is denied; Amtrak's conditional motion for leave to amend complaint is denied as moot; and Amtrak's motion for modification of this Court's Order of January 2, 1991 is denied.

An appropriate Order follows.

Clarence C. Newcomer, J.

ORDER

AND NOW, this 15th of September, 1997, upon consideration of the following Motions, and any responses and replies thereto, it is hereby ORDERED that:

1. Pennsylvania Public Utility Commission's Motion for Dissolution of this Court's Injunction is DENIED;

2. National Railroad Passenger Corporation's Conditional Motion for Leave to Amend Complaint is DENIED as moot; and

3. National Railroad Passenger Corporation's Motion for Modification of this Court's Order of January 2, 1991 is DENIED.

AND IT IS SO ORDERED.

Clarence C. Newcomer, J.

Footnotes

n1 45 U.S.C. § 546b was repealed by § 7(b) of the Act of July 5, 1994, Pub. L. 103-272, 108 Stat. 1379; it was reenacted with linguistic but not substantive change and recodified at 49 U.S.C. § 24301(l) by § 1(e) of the same Act, 108 Stat. 904. See H.R. Rep. No. 180, 103d Cong. 2d Sess. 1, 3, 4 (1993), reprinted in 1994 U.S.C.C.A.N. 818, 820, 822. For the purposes of this opinion, the Court will cite to the statute as 49 U.S.C. § 24301(l).

n2 This state court case arose out of an order which was issued by the Commission on December 10, 1993, requiring Amtrak to prepare and submit plans and carry out construction necessary to restore the piers and bearings of the 41st Street Bridge in Philadelphia to their original load-carrying capacity at the initial cost of the City. Amtrak filed a Petition for Reconsideration,

Amendment, and Supersedeas of the order with the commission on the grounds that the order was prohibited by the Rail Passenger Service Act.

After a hearing, a Commission administrative law judge issued a Recommended Decision finding that Amtrak's tax exemption precluded the Commission from assessing Amtrak responsibility for Pennsylvania highway bridge maintenance and recommending that the costs be allocated to the City of Philadelphia and Consolidated Rail Corporation ("Conrail"). The Commission adopted the recommended decision by order dated March 31, 1995. Both the City and Conrail appealed the decision to the Pennsylvania Commonwealth Court. Amtrak did not intervene in those proceedings. The appellants each questioned the allocation of costs among themselves and made arguments regarding the effect of a 1927 contract between the City and an alleged predecessor-in-interest of Conrail and Amtrak on the allocation of costs with respect to the 41st Street Bridge.

In its opinion, the Pennsylvania Commonwealth Court sua sponte examined the Commission's jurisdiction in rail-highway crossing cases and analyzed the decisions in the federal court cases, including the decisions issued by this Court and the Third Circuit, which limit the Commission's authority to impose taxes or fees against Amtrak due to the language in 49 U.S.C. § 24301(l). The Commonwealth Court decided that the federal courts were incorrect in finding that the Commission assessments against parties in rail-highway crossing cases are "taxes or other fees" within the meaning of the federal statute; therefore, according to the Pennsylvania appellate court's interpretation of the federal tax exemption statute, Amtrak should be considered to be a "party in interest" for purposes of allocating costs and responsibilities. The

Commonwealth Court then vacated the Commission's order in that case and remanded the case with specific instructions "to apportion costs for planning, repair and maintenance of the bridge between the present parties and [Amtrak] in accordance with the foregoing opinion."

The Commission's Petition for Allowance of Appeal to the Pennsylvania Supreme Court was denied. Thus, the Commonwealth Court decision represents that final determination of the state courts on the tax exemption issue.

In light of the Commonwealth Court's decision, the Commission filed a petition for a writ of certiorari with the United States Supreme Court. The Commission argued in its petition that the state court case raises a recurring question which has not been decided by the Supreme Court: whether the Commission assessment of costs and responsibilities under its jurisdiction over safety issues in rail-highway crossing cases are taxes or fees within the meaning of 49 U.S.C. § 24301(l)? The Commission argued that a decision by the Supreme Court was necessary because: (1) case law reveals a serious and irreconcilable conflict between the Third Circuit and the state courts of Pennsylvania; (2) case law also reveals a conflict between the decisions in the Third Circuit and the Second Circuit on the same issue; (3) the Commission cannot decide any cases where Amtrak or SEPTA is a party without running afoul of either the federal or state courts, which prevents the Commission from fulfilling its statutory mandate regarding safety issues in rail-highway crossing cases until this question is resolved; and (4) the characterization of Commission assessments as a "tax" has serious ramifications in other cases.

On March 31, 1997, the Supreme Court denied the Commission's petition for a writ of certiorari.

n3 The abrogation argument necessarily revolves around 49 U.S.C. § 24301(l) which provides:
Exemption from taxes levied after September 30, 1981. - -(1) Amtrak or a rail carrier subsidiary of Amtrak is exempt from a tax or fee imposed by a State, a political subdivision of a State, or a local taxing authority and levied on it after September 30, 1981. However, Amtrak is not exempt under this subsection from a tax or fee that it was required to pay as of September 10, 1982.

(2) The district courts of the United States have original jurisdiction over a civil action Amtrak brings to enforce this subsection and may grant equitable or declaratory relief requested by Amtrak.
49 U.S.C. § 24301(l).

n4 Section 24301 provides:
Status and applicable laws.
(a) Status. – Amtrak –

(1) is a rail carrier under section 10102 of this title;

(2) shall be operated and managed as a for-profit corporation; and

(3) is not a department, agency, or instrumentality of the United States Government.
(b) Principal office and place of business. – The Principal office and place of business of Amtrak are in the District of Columbia. Amtrak is qualified to do business in each State in which Amtrak carries out an activity authorized under this part. Amtrak shall accept service of process by certified mail addressed to the secretary of Amtrak at its principal office and place of business. Amtrak is a citizen only of the District of Columbia when deciding original jurisdiction or the district courts of the United States in a civil action.
49 U.S.C. § 24301(a)-(b).

n5 H.R. Rep. No. 81, 97th Cong., 1st Sess. 21 (1981).

n6 Under Eleventh Amendment jurisprudence, federal courts are charged with determining whether Congress has unequivocally demonstrated its intent to abrogate the states' immunity from suit. Seminole Tribe, 116 S. Ct. at 1123. This intent must be "unmistakably clear in the language of the statute." Id. (citations omitted). The Court finds that Congress in § 24301(l)(1)-(2) provided an "unmistakably clear" statement of its intent to abrogate the states' immunity. Subsection (1)(1) provides that "Amtrak . . . is exempt from a tax or fee imposed by a State, a political subdivision of a State, or a local taxing authority and levied on it after September 30, 1981." (emphasis added). Subsection(1)(2) provides that "the district courts of the United States have original jurisdiction over a civil action Amtrak brings to enforce this subsection and may grant equitable or declaratory relief requested by Amtrak." This language makes it unmistakably clear that Congress intended to allow Amtrak to bring suit against a state or political subdivision of the state in federal court. Thus, the Court finds that Congress intended, through the language of § 24301(l), to abrogate the states' sovereign immunity from suit. Although the Court finds that Congress intended to abrogate, the Court does not decide at this point whether Congress abrogated the states' sovereign immunity pursuant to a constitutional provision that grants Congress the power to abrogate.

In light of Seminole Tribe, Amtrak would be hard pressed to demonstrate that Congress did abrogate pursuant to constitutional provision that authorizes Congress to abrogate. Indeed, Amtrak never even advances this argument.

n7 In its motion, Amtrak argues that it should be entitled to amend the complaint to add the actual commissioners as defendants under the Ex Parte Young

doctrine. The Court, however, will not reach the merits of Amtrak's motion because the Court has denied its motion as moot.

n8 Amtrak requests the Court to modify its January 2, 1991 Order to cover all crossings of Amtrak's right-of-way in the Commonwealth of Pennsylvania. Both defendants argue that Amtrak's request is overbroad because it asks this Court to issue a blanket injunction involving numerous local governments whose rights are not even represented here. Moreover, the defendants argue that Amtrak's request is overbroad because it includes facilities which are purely railroad facilities in nature. Although this Court believes that there is some merit to defendants' arguments, the Court will not address these arguments because Amtrak cannot demonstrate that it is entitled to a modification of the permanent injunction, as discussed infra.

n9 The filing of the petition of a writ of certiorari actually cuts against Amtrak's argument that the objectives of this Court's Order of January 2, 1991 are not being fulfilled, or are in imminent danger of being violated. One could plausibly argue that the Commission filed its writ of certiorari because it did not want to violate either the Commonwealth Court's order or this Court's order. Indeed, the Commission makes this argument, and the Court finds it to be persuasive.

n10 If the Commission does violate the terms of the Order of January 2, 1991, Amtrak would surely be entitled to move this Court to enforce the terms of that Order. However, at this present time, Amtrak's motion is premature in that it merely speculates that the Commission will violate the Order in place.

No. 01-2419

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL RAILROAD PASSENGER CORPORATION

v.

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION; JOHN M. QUAIN, CHAIRMAN; ROBERT K. BLOOM, VICE CHAIRMAN; NORA MEAD BROWNELL, COMMISSIONER; AARON WILSON, JR., COMMISSIONER; TERRENCE J. FITZPATRICK, COMMISSIONER; NORFOLK SOUTHERN RAILWAY COMPANY; CSX TRANSPORTATION, INC.; THE SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY; JOHN K. LEARY, GENERAL MANAGER; The Pennsylvania Public Utility Commission; John M. Quain, Chairman; Robert K. Bloom, Vice Chairman; Nora Mead Brownell, Commissioner; Aaron Wilson, Jr., Commissioner; Terrence J. Fitzpatrick, Commissioner
Appellants

November 22, 2002

ORDER

The petition for rehearing filed by the Appellant in the above-entitled case, having been submitted to the judges who participated in the decision of the this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court in banc, the petition for hearing is hereby DENIED.

By the Court,

United States Circuit Judge

FILED
APR 23 2003
CLERK

No. 02-1402

IN THE

Supreme Court of the United States

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION; JOHN M. QUAIN, CHAIRMAN; ROBERT K. BLOOM, VICE CHAIRMAN; NORA MEAD BROWNELL, COMMISSIONER; AARON WILSON, JR., COMMISSIONER; TERRENCE J. FITZPATRICK, COMMISSIONER,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

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31 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

The question presented by this case is:

1) Whether a prior judgment in Amtrak's favor that the Pennsylvania Public Utility Commission is not an "arm of the state" and is not entitled to Eleventh Amendment immunity was properly given preclusive effect by the court below to prevent the Commission from relitigating the same issue against Amtrak in this case.

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IN THE

Supreme Court of the United States

No. 02-1402

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION; JOHN M. QUAIN, CHAIRMAN; ROBERT K. BLOOM, VICE CHAIRMAN; NORA MEAD BROWNELL, COMMISSIONER; AARON WILSON, JR., COMMISSIONER; TERRENCE J. FITZPATRICK, COMMISSIONER,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

National Railroad Passenger Corporation ("Amtrak") filed the action below seeking declaratory and injunctive relief.[1] Amtrak initiated the case below to enforce compliance with

[1] Amtrak is a corporation established by Congress pursuant to the Rail Passenger Service Act of 1970, 49 U.S.C. § 24101 *et seq.* (the "RPSA"). The federal government owns 100% of Amtrak's preferred stock. American Premier Underwriters, Inc. owns 56% of Amtrak's common stock. Burlington Northern/Santa Fe Railroad Company owns 36% of Amtrak's common stock.

federal law and with the terms of its Northeast Corridor Freight Operating Agreement ("FOA"), an agreement pursuant to which defendants Norfolk Southern Railroad Company ("NS") and CSX Transportation, Incorporated ("CSXT") operate freight railroad traffic over Amtrak's rail line. Amtrak's action sought to enjoin the petitioner, the Pennsylvania Public Utility Commission ("PUC" or "the Commission"), from adjudicating issues preempted by federal law or subject to arbitration and to prevent the PUC from ordering Amtrak to participate in the PUC proceedings. In addition, Amtrak's action sought to prevent NS and CSXT from litigating arbitrable questions relating to railroad operating rights under the FOA in a proceeding originally brought by the Southeastern Pennsylvania Transportation Authority ("SEPTA") before the PUC.

The PUC responded to Amtrak's complaint by filing a motion to dismiss based in part on the Commission's assertion that it is an "arm of the state" entitled to Eleventh Amendment immunity. Amtrak opposed the PUC's motion on various grounds, including that in litigation between Amtrak and the PUC in 1997, the district court decided that the PUC was not an "arm of the state" and was not entitled to Eleventh Amendment immunity from suits brought by Amtrak. The Court also ruled that the 1997 judgment determining that question precluded the PUC from relitigating the issue against Amtrak. The district court denied the PUC's motion to dismiss and agreed with Amtrak that the 1997 judgment precluded the PUC from relitigating whether it was an "arm of the state" entitled to Eleventh Amendment immunity. Pet. App. at 39a-40a. Because this case involves the preclusive effect of a prior federal judgment, Amtrak sets out the facts and proceedings relevant to the judgment giving rise to preclusion.

Amtrak's 1987 Action Against the PUC

On June 30, 1987, the United States District Court for the Eastern District of Pennsylvania issued a declaratory judgment that PUC assessments on Amtrak for public highway bridges violated Amtrak's federal exemption under the Rail Passenger Service Act ("RPSA"), 49 U.S.C. § 24101 *et seq.*, from the imposition of state and local taxes or fees. The district court also issued a permanent injunction barring the PUC from imposing on Amtrak public highway bridge maintenance costs arising out of the replacement of the Cassatt Avenue highway bridge in the Townships of Tredyffrin and Easttown, Pennsylvania. *National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n,* 665 F. Supp. 402, 412 (E.D. Pa. 1987) (hereinafter "*Amtrak*"). The Third Circuit affirmed, stating that "Amtrak was to be exempt . . . '*to the same extent as the United States is exempt* from the payment of such taxes or other fees.'" 848 F.2d 436, 440 (3d Cir. 1988) (quoting H.R. Rep. No. 81, 97th Cong., 1st Sess. 21 (1981)), *cert. denied,* 488 U.S. 893 (1988), *permanent injunction enforced,* 1991 WL 998 (E.D. Pa. Jan. 2, 1991. The district court declared that the PUC's attempt to impose bridge maintenance costs on Amtrak constituted a "tax or fee" from which Amtrak was exempt under 49 U.S.C. § 24301(*l*)(1) (the former 45 U.S.C. § 546b). *Amtrak*, 665 F. Supp. at 412. The district court also enjoined the PUC from assessing Amtrak for the costs of maintenance and repair of the Cassatt Avenue Bridge.[2] *Id.*

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[2] The PUC has twice unsuccessfully sought review in this Court of federal judgments holding that Amtrak is immune under the RPSA from PUC authority. *See City of Chester v. Pennsylvania Pub. Util. Comm'n,* 773 A.2d 1280 (Pa. Commw. Ct.), *appeal denied,* 788 A.2d 379 (Pa.), *cert. denied,* 535 U.S. 951 (2002); *National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n,* 665 F. Supp. 402, 412 (E.D. Pa. 1987), *aff'd,* 848 F.2d 436 (3d Cir.), *cert. denied,* 488 U.S. 893 (1988).

The 1997 Denial of the PUC's Claim of Eleventh Amendment Immunity

On May 6, 1997, the PUC moved the district court for dissolution of the injunction, citing this Court's decision in *Seminole Tribe v. Florida,* 517 U.S. 44 (1996). The PUC argued that it is an "arm of the state" and immune from suit in federal court under the Eleventh Amendment, and thus that the district court could not modify or maintain the permanent injunction against the PUC.

On September 15, 1997, the district court issued a memorandum opinion in which it denied the PUC's Motion for Dissolution. In a 31-page opinion, the district court carefully analyzed the evidence provided by the PUC [3] and rejected the PUC's claim that it is an "arm of the state" entitled to Eleventh Amendment immunity under the reasoning of *Seminole Tribe. National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n,* 1997 WL 597963 (E.D. Pa. Sept. 15, 1997) (Pet. App. 55a-65a). The PUC did not appeal from that order.[4]

The PUC then sought reconsideration of the September 15, 1997, decision, but the district court denied the PUC's request

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[3] *See* Pet. at 4 (noting that the district court's determination that the PUC failed to establish that it is an "arm of the state" in the 1997 litigation was "based upon [the PUC's] motion and the attached supporting documentation"); *see also* Pet. App. at 16a ("In support of its request for relitigation [of the "arm of the state" issue] the PUC submitted evidence of particular circumstances which supplemented its submission in 1997"). The district court analyzed the evidence offered by the PUC under *Christy v. Pennsylvania Turnpike Comm'n,* 54 F.3d 1140 (3d Cir. 1995).

[4] In the 1997 action and the 2001 action, Amtrak also asserted federal jurisdiction under *Ex Parte Young,* 209 U.S. 123 (1908). Because the district court determined that the PUC is not an "arm of the state" in 1997, and that the PUC was not entitled to relitigate that issue in 2001, the district court did not reach the *Ex Parte Young* issue in either the 1997 or the 2001 litigation.

as untimely. *National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n,* 1997 WL 734016 at *2 (E.D. Pa. Nov. 13, 1997). The district court held that the PUC's motion was properly viewed as one under FED. R. CIV. P. 59(e) and that it had been untimely filed. *Id.* As a result, the district court had no jurisdiction to consider the PUC's request. Once again, the PUC did not appeal from this order.

On December 19, 1997, the PUC filed yet another motion with the district court, this time citing FED. R. CIV. P. 60(b) as authority. On February 23, 1998, the district court entered an order denying this second motion for reconsideration. *National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n,* 1998 WL 103377 (E.D. Pa. Feb. 23, 1998). The district court specifically found that the PUC had done nothing more than "reargue[] issues that have already been decided at various times by this Court." *Id.* at *1. The district court also noted that it had previously considered and rejected the PUC's arguments under *Seminole Tribe. Id.* at *2 n.1. Those matters had therefore been decided and were barred from relitigation by *res judicata. Id.* at *2.

On March 23, 1998, the PUC noted an appeal from the February 23rd Order, but the United States Court of Appeals for the Third Circuit dismissed the PUC's appeal for lack of jurisdiction. *National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n,* 178 F.3d 1280 (3d Cir. 1999) (table).

The 2001 Decision Giving Preclusive Effect to the Prior Judgment

Amtrak brought the action below pursuant to its authorizing statute, the RPSA, 49 U.S.C. §§ 24301(g) and 24902(j), seeking declaratory and injunctive relief against the PUC. The Commission responded to Amtrak's complaint with a motion to dismiss. In its motion, the PUC argued, among other things, that it was an "arm" of the Commonwealth of Pennsylvania and thus immune from suit

under the Eleventh Amendment of the Constitution. Amtrak opposed the PUC's motion to dismiss, arguing that the Commission was precluded from relitigating its status for Eleventh Amendment purposes, because in 1997 Amtrak had already won a prior judgment against the PUC on the same issue. Amtrak also responded to the substance of the PUC's arguments, noting that they were precisely the same arguments that the PUC had put before the district court in 1997.

In an opinion issued May 10, 2001, the district court denied the PUC's motion to dismiss. *National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n,* 159 F. Supp. 2d 28 (E.D. Pa. 2001) (Pet. App. 25a-44a). The district court found that "[t]he issue of the PUC's Eleventh Amendment immunity has already been thoroughly litigated between Amtrak and the PUC in this Court." Pet. App. at 39a. Citing its September 15, 1997 judgment that the PUC is not an "arm of the state" and its February 23, 1998, order denying the PUC's second request for reconsideration, the district court concluded that application of collateral estoppel was appropriate. *Id.* at 39a-40a.

The PUC noted an interlocutory appeal to the Third Circuit. That court held that the district court had properly applied the doctrine of collateral estoppel (issue preclusion) to prevent the PUC from relitigating its claim to be an "arm of the state" entitled to Eleventh Amendment immunity against Amtrak. *National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n,* 288 F.3d 519 (3d Cir. 2002) (Pet. App. at 1a-24a). The Third Circuit determined that all elements of collateral estoppel had been met and that the PUC should therefore be precluded from relitigating the same claim against Amtrak. Pet. App. at 7a-11a. Specifically, the Third Circuit held that the district court's 1997 holding that the PUC was not an "arm of the state" was "essential to the judgment" for preclusion purposes. *Id.* at 9a-10a. As the Third Circuit correctly explained, "[i]f the

District Court had ruled differently on [the Eleventh Amendment] issue, it would have dissolved the outstanding injunction." *Id.* at 10a.

The Third Circuit also rejected the PUC's argument that equitable considerations should prevent the application of preclusion in this case. The court held that there was no reason to apply the "unmixed questions of law" exception to the doctrine of issue preclusion. The Third Circuit found that the district court's application of collateral estoppel had not "foreclose[d] the PUC from challenging a legal precept." *Id.* at 16a.[5] Thus, there was no unfairness in precluding the PUC from imposing on Amtrak "the burden of relitigating the application of the [applicable] legal principles to the unchanged circumstances of the PUC." *Id.* The Third Circuit also held that, although the case below and Amtrak's initial proceeding against the PUC presented distinct preemption issues, "the issue to which estoppel is sought does not arise in such a different context that the current situation implicates any of the concerns underlying the 'unmixed questions of law' doctrine." *Id.* The court thus affirmed the district court's holding that issue preclusion prevented the PUC from compelling Amtrak to relitigate the question of whether the PUC is an "arm of the state" entitled to Eleventh Amendment immunity.

The PUC sought rehearing of the Third Circuit's opinion. On November 22, 2002, the Third Circuit denied the PUC's

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[5] In response to the PUC's submission to the district court of "evidence of its particular circumstances which supplemented its submission in 1997," the Third Circuit noted that the PUC "did not . . . submit any evidence that its circumstances had changed since [1997]." Pet. App. at 16a. The Third Circuit noted that "[t]he fact that the PUC may not have submitted all of the relevant evidence available to it in 1997, hardly justified placing on Amtrak the burden of relitigating the application of the *Christy* legal principles to the unchanged circumstances of the PUC." *Id.*

request for rehearing. Pet. App. at 75a-76a. The PUC then petitioned this Court for a writ of certiorari.

REASONS FOR DENYING THE PETITION

I. THE PUC IMPROPERLY SEEKS REVIEW OF QUESTIONS NOT PRESENTED TO OR DECIDED BY THE COURTS BELOW.

The PUC completely misunderstands the holding of the Third Circuit, and the Commission improperly seeks to have this Court review a question not presented by the case below and not decided by the Third Circuit. Contrary to the PUC's statement of issues, *see* Pet. at i, 8-10, this case does not concern whether there has been a valid congressional abrogation of Eleventh Amendment immunity or whether there has been a voluntary waiver/consent to suit in federal court. The courts below held that the PUC was precluded from relitigating a threshold question—whether the PUC is an "arm of the state" that is even entitled to claim Eleventh Amendment immunity in suits brought by Amtrak—and, thus, never reached the abrogation and waiver/consent issue raised by the PUC.[6] Because the Commission previously litigated this issue against Amtrak and lost in that prior action, the courts below held that it was precluded from attempting to relitigate its status for Eleventh Amendment purposes.

As the district court correctly observed in its 1998 decision denying the PUC's second request for reconsideration of the district court's immunity decision, because the PUC is not an "arm of the state," there was no reason to consider the issues of congressional abrogation or waiver. *See National R.R. Passenger Corp.*, 1998 WL 103377 at *2 n.1 ("the issue of abrogation was not dispositive because the Commission never

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[6] In fact, the Commission concedes this at a later point in its petition. *See* Pet. at 21 ("[T]he issue to which the Third Circuit applied estoppel was whether the PA PUC is an arm of the state at all.").

established that it was an arm or alter ego of the state, and thus entitled to Eleventh Amendment immunity"). Those issues would be relevant only if the PUC had been held to be an "arm of the state" entitled to claim Eleventh Amendment immunity. The Commission does not meet this threshold, and thus the abrogation and waiver issues were not litigated or decided below. Indeed, the Third Circuit expressly distinguished the issue before it—"whether a party is an arm of the state and thus entitled to the cloak of immunity"—from the abrogation and waiver issues. Pet. App. at 23a-24a.

As a general rule, this Court "decline[s] to consider questions presented in a petition for certiorari that have not been considered by the lower court." *Patrick v. Burget,* 486 U.S. 94, 99 n.5 (1988); *see* 17 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 4036, at 38 (2d ed. 1988). Where, as in this case, neither the district court nor the Third Circuit addressed the issues of abrogation or waiver/consent, this Court should not review those issues in the first instance. *See National Collegiate Athletic Ass'n v. Smith,* 525 U.S. 459, 470 (1999); *see also Green Tree Fin. Corp. v. Randolph,* 531 U.S. 79, 92 (2000). In fact, because the PUC failed to satisfy the threshold test of showing that it is an "arm of the state," the abrogation and consent/waiver issues were never placed before the courts below. Consequently, this Court should not review issues that were neither presented to nor decided by the lower courts, and it should deny the PUC's petition for writ of certiorari.

II. THE THIRD CIRCUIT PROPERLY APPLIED ISSUE PRECLUSION TO THE PUC'S CLAIM OF ELEVENTH AMENDMENT IMMUNITY AGAINST AMTRAK.

The PUC incorrectly argues that (a) its claim of sovereign immunity was not essential to the judgment for purposes of preclusion; (b) the Third Circuit's opinion conflicts with prior

rulings from this Court; and (c) that the "unmixed questions of law" exception to the application of issue preclusion applies to this case. None of these arguments has any merit.

A. Decision of a Claim of Eleventh Amendment Immunity Is "Essential" to the Judgment for Preclusion Purposes.

In its original 1997 decision that the PUC is not an "arm of the state" entitled to Eleventh Amendment immunity, the district court properly recognized that the Commission's "argument is necessarily a threshold question" that went to the very power of the district court to maintain the injunction. Pet. App. at 50a. The Third Circuit, in turn, correctly held that the district court's earlier finding that the PUC was not an "arm of the state" was essential to the district court's judgment. *Id.* at 10a. The Commission's assertion in its Petition that a claim of Eleventh Amendment immunity "is not essential to the judgment on the merits of the action in which the defense is raised," Pet. at 12, is therefore simply incorrect.

Jurisdiction over both the subject matter of the action and the parties is an essential requisite of any valid judgment. *Insurance Corp. v. Compagnie des Bauxites,* 456 U.S. 694, 701 (1982) ("The validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties") (citing *Stoll v. Gottlieb,* 305 U.S. 165, 171-72 (1938)); RESTATEMENT (SECOND) OF JUDGMENTS § 1 (1982) (noting that validity of judgment depends upon court having both subject matter and personal jurisdiction). Thus, if a state governmental entity enjoys Eleventh Amendment immunity, a federal court ordinarily will have no power to issue a judgment binding that entity. As a result, the district court's decision on the PUC's immunity claim was unquestionably "essential" to its judgment, and the PUC was properly precluded from relitigating its claim that it was an "arm of the state."

This Court has treated the jurisdictional bar of the Eleventh Amendment as similar to both subject matter jurisdiction and personal jurisdiction. *See Wisconsin Dep't of Corrections v. Schacht,* 524 U.S. 381, 394-95 (1998) (Kennedy, J., concurring) (explaining "the hybrid nature of the jurisdictional bar erected by the Eleventh Amendment"); *id.* at 391 (opinion of the Court) (noting that this Court has not decided whether Eleventh Amendment immunity is a matter of subject matter jurisdiction). The precise nature of the immunity is not germane to this case, however, since this Court has held that even issues as fundamental to a court's authority as subject matter jurisdiction and personal jurisdiction are subject to preclusion. *Insurance Corp.,* 456 U.S. at 702 n.9.

Moreover, the PUC's argument is flatly contradicted by this Court's opinion in *Montana v. United States,* 440 U.S. 147 (1979). In that case, this Court held that the United States was collaterally estopped from relitigating the question of its sovereign immunity by a prior judgment on the immunity issue rendered by the Montana state courts. *Id.* at 152-53, 164. This Court noted that an element of collateral estoppel is that an issue must have been "necessarily determined" by a court of competent jurisdiction. *Id.* at 153. Obviously, this Court could not have held that the United States was collaterally estopped unless it determined that the issue of sovereign immunity was one that was essential to the prior judgment. But if one were to accept the PUC's novel interpretation of issue preclusion, then *Montana* would necessarily have been wrongly decided. Under the PUC's argument this Court could not have held the United States collaterally estopped, because the issue of the United States' sovereign immunity would not have been essential to the earlier judgment. The opinion in *Montana* therefore demonstrates conclusively that the PUC's argument is meritless.

B. The Third Circuit's Holding Is Entirely Consistent With This Court's Precedent.

The PUC also contends that the Third Circuit's opinion conflicts with this Court's opinion in *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). The PUC's argument is based on a simple misrepresentation of the holding in that case. *Metcalf & Eddy* does not hold, as the PUC would have it, that a determination on a claim of Eleventh Amendment immunity is not essential to the judgment in a proceeding. *See* Pet. at 13-14. Rather, that case stands only for the proposition that Eleventh Amendment immunity is an issue that is sufficiently separate from the *merits* of the action that the immunity issue is immediately appealable under the collateral order doctrine. *Metcalf & Eddy*, 506 U.S. at 144, 145.

This is quite different from saying that an immunity determination is not essential to the proceeding. In *Metcalf & Eddy*, the merits of the action concerned the respondent's claims for breach of contract and damages to its business reputation. *Id.* at 141. This Court's opinion held only that the immunity issue was sufficiently separate from the underlying merits of those claims to permit immediate appeal from the decision on the immunity question. *Id.* at 144-45. In this case, the PUC did appeal the district court's ruling to the Third Circuit, which ruled for Amtrak. Therefore, nothing in the Third Circuit's opinion conflicts in any way with this Court's holding in *Metcalf & Eddy*.[7]

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[7] Nor does this Court's brief *per curiam* decision in *Mathias v. Worldcom Technologies, Inc.*, 535 U.S. 682 (2002) assist the PUC. That decision did nothing more than dismiss a writ of certiorari as improvidently granted and contains no analysis of the preclusion issue. In any event, such a dismissal says nothing about the merits of the case. *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 366 n.1 (1973). Thus, contrary to the PUC's contentions, there is no "conflict" between *Mathias* and the Third Circuit's opinion in this case.

C. The "Unmixed Questions of Law" Exception to Collateral Estoppel Is Not Applicable to the PUC's Attempt to Relitigate its Alleged Entitlement to Eleventh Amendment Immunity.

1. The PUC's Contention That the Third Circuit Misapplied a Properly Stated Rule of Law Does Not Merit Certiorari.

The PUC does not dispute the Third Circuit's articulation of the "unmixed questions of law" exception to issue preclusion. Rather, the PUC disputes the Third Circuit's failure to apply that exception in this case. *See* Pet. at 19 ("[T]he Third Circuit has rendered a decision which is contrary to the dictates of the Restatement (Second) of Judgments, despite its claim that it has 'consistently applied this general rule in determining the collateral effect of federal court judgments'") (quoting Pet. App. at 6a). As a threshold matter, the PUC's argument that the Third Circuit merely misapplied a properly articulated rule of law does not merit this Court's review. *See* SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law"). The PUC's argument fails to satisfy the conditions on which this Court will issue a writ of certiorari, and the petition should be denied on that basis alone.

2. The PUC's Status as an "Arm of the State" is Not a Pure, "Unmixed" Question of Law.

Nevertheless, even if application of the "unmixed questions of law" exception in this case turns on whether the PUC's entitlement to immunity is a "pure question of law," the PUC cannot meet that standard. To establish its immunity from suit under the Eleventh Amendment in the Third Circuit, the PUC must show that it is an "arm of the state," as it (unsuccessfully) attempted to do in connection with the 1997

judgment. *Christy*, 54 F.3d at 1144; *see National Railroad Passenger Corp.*, 1997 WL 597963, at *6 (Pet. App. at 55a); *accord Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 51-52 (1994). Whether the PUC is an "arm of the state," however, is not a pure question of law. Rather, it is a mixed question of law and fact that requires examination of both legal and factual issues relevant to the relationship between the entity and the state. *See Metcalf & Eddy,* 506 U.S. at 147 (noting that some Eleventh Amendment cases may present "difficult *factual* questions as to whether an agency is an 'arm of the State'") (emphasis added); *Christy*, 54 F.3d at 1150 (examining whether a judgment against the entity would come from the state treasury, the status of the entity under state law, and the degree of autonomy the entity enjoys).

Notably, the PUC's claims of error to the Third Circuit belie its contention that its status as an "arm of the state" entitled to Eleventh Amendment is a pure question of law. To the contrary, when the PUC sought to relitigate whether it is an "arm of the state" in this case, it "submitted additional *evidence* which supplemented its submission in 1997." Pet. App. at 16a (emphasis added). The Third Circuit echoed the PUC's acknowledgement of the factual nature of the PUC's immunity claim when it held that "[t]he fact that the PUC may not have submitted all of the relevant *evidence* available to it in 1997, hardly justifies placing on Amtrak the burden of relitigating the application of the Christy legal principles to the unchanged circumstances of the PUC." *Id.* (emphasis added). The PUC's implicit concession of the factual nature of the "arm of the state" inquiry continues in this Court. *See* Pet. at 10 ("The denial in the prior case was based upon the District Court's determination on the burden of proof under *Christy*, whether the PA PUC provided *sufficient proof of entitlement to the defense.* By affording preclusive effect to denial of immunity *based on insufficient offer of proof*, the Third Circuit effectively denies the PA PUC *any opportunity*

to offer additional proof to support the immunity claim in future suits brought by Amtrak.") (emphasis added).

A review of both the applicable case law and the PUC's own claims of error in this case make plain that the Commission's claim that it is an "arm of the state" is not a pure issue of law. The Third Circuit thus did not err in refusing to apply the "unmixed questions of law" exception in this case.

3. Even If the PUC's Alleged Entitlement to Immunity Were a Pure Issue of Law, Preclusion Would Still Be Appropriate.

Even assuming, *arguendo,* that the PUC's status as an "arm of the state" entitled to Eleventh Amendment immunity involves a pure issue of law, the Third Circuit's application of preclusion would nonetheless be proper. When a subsequent suit seeks relitigation of an issue decided in prior litigation between the same or closely related parties, the "unmixed questions of law" exception simply does not apply, regardless of whether the issue is one of law or one of fact:

> When the claims in two separate actions between the same parties are the same or are closely related . . . it is not ordinarily necessary to characterize an issue as one of fact or of law for purposes of issue preclusion . . . . In such a case, it is unfair to the winning party and an unnecessary burden on the courts to allow repeated litigation of the same issue in which it is essentially the same controversy, *even if the issue is regarded as one of "law."*

United States v. Stauffer Chem. Co., 464 U.S 165, 171 (1984) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 28 comment b (1982)) (emphasis added); *see United States v. Moser*, 266 U.S. 236, 242 (1924) ("[A] fact, question or right distinctly adjudged in the original action cannot be disputed in a subsequent action"); *cf. Stauffer*, 464 U.S. at 171 n.4

("An exception which requires a rigid determination of whether an issue is one of fact, law or mixed fact and law, as a practical matter, would often be impossible to apply because 'the journey from a pure question of fact to a pure question of law is one of subtle gradations rather than one marked by a rigid divide'") (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 28 comment b (1982)). Thus, where, as here, the litigation involves the same issue that arose in prior litigation between the same parties, the fact that the issue is a question of law, as opposed to a mixed question of law and fact, does not bar application of issue preclusion between those parties. This rule applies equally to the issue of Eleventh Amendment immunity. *Montana*, 440 U.S. at 152-53, 164.

4. The Action Below and Amtrak's Initial Action Against the PUC Are Related, and the PUC's Claim of Immunity in this Case is Identical to its Claim in the Prior Litigation.

Moreover, even if one were to assume that the "arm of the state" inquiry is purely one of law, the PUC must also establish that this action and the prior action are "substantially unrelated." RESTATEMENT (SECOND) OF JUDGMENTS § 28(2)(a) (1982).[8] The PUC advocates an unjustifiably narrow view of "substantially unrelated" prong in order to stretch the limits of the "unmixed questions of law" exception to fit this case. This Court, however, has rejected the narrow view that the PUC asserts, and the PUC cites no authority to the contrary. *See* Pet. at 19.

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[8] Alternatively, the PUC can seek to establish that relitigation is warranted to take account of an intervening change in the law or to avoid inequitable administration of the law. RESTATEMENT (SECOND) OF JUDGMENTS § 28(2)(b) (1982). The PUC does not allege that either of these alternatives provides a basis for relitigation.

The PUC's contention that the instant case and the prior action are "substantially unrelated" hinges on its assertion that the two cases involve different claims. *See id.* Yet, the particular issue that the PUC seeks to relitigate, that it is an "arm of the state" entitled to Eleventh Amendment immunity, is *identical* to the issue decided in the 1997 judgment. Indeed, in both cases the PUC's immunity argument served as a threshold issue. In addition, the record in this case demonstrates that the action below and Amtrak's earlier litigation against the PUC are closely related. Both cases involve claims by Amtrak that the RPSA preempts the PUC authority, as the Third Circuit properly recognized. *See id.* at 16a. Further, in the district court below, Amtrak asserted that the PUC's authority was preempted by 49 U.S.C. § 24301(g), a subsection of the very same section of the RPSA that was at issue in the earlier litigation.

The fact that a claim previously rejected in litigation between two parties is reasserted in subsequent litigation involving different facts or a different transaction does not make those two claims "substantially unrelated." *See Stauffer*, 464 U.S. at 172 n.5 (rejecting the government's argument that "two cases presenting the same legal issue must arise from the very same facts or transaction before an estoppel can be applied"); *accord Burlington N.R.R. v. Hyundai Merchant Marine Co.*, 63 F.3d 1227, 1237 (3d Cir. 1999) ("A party cannot satisfy the 'substantially unrelated claim' test where 'the same general legal rules govern both cases and . . . the facts of both cases are indistinguishable as measured by those rules'") (quoting 18 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 4425 at 253-54 (1981)). Thus, issue preclusion will apply unless "'the issue of law' arises in a successive case that is *so unrelated* to the prior case that relitigation of the issue is warranted." *Burlington N.R.R.*, 63 F.3d at 1237 (citing *Stauffer*, 464 U.S. at 172 n. 5). Because the PUC has failed to show that the

"arm of the state" inquiry is a pure question of law, and has failed to establish that "the two actions involve claims that are substantially unrelated," the PUC cannot rely upon the "unmixed questions of law" exception to issue preclusion to relitigate whether it is an "arm of the state" entitled to immunity from suit against Amtrak. RESTATEMENT (SECOND) OF JUDGMENTS § 28(2)(a) (1982).

III. THE PUC'S HYPOTHETICAL CONCERNS ABOUT POSSIBLE CLAIMS OF OFFENSIVE NON-MUTUAL ESTOPPEL DO NOT WARRANT THIS COURT'S REVIEW.

Finally, the PUC argues that "[t]he Third Circuit's holding might be extended further through the application of offensive non-mutual collateral estoppel[.]" Pet. at 20. This concern is both misplaced and completely hypothetical. First of all, Amtrak's federal authorizing statute confers certain federal immunities from state and local jurisdictions crafted especially for Amtrak due in part to its unique status as owner and operator of a "valuable resource of the United States." 49 U.S.C. § 24101(a)(7); *see also* 49 U.S.C. § 24301(*l*) (Amtrak's immunity from state and local taxes, fees, or other charges); 49 U.S.C. § 24902(j) (Amtrak property exempted from state and local building, zoning, and similar or related laws). As the Third Circuit observed, "[t]he sole effect of estoppel in this context will be to afford Amtrak access to the federal courts (that other utilities may conceivably be denied) unless and until the circumstances of the PUC materially change." Pet. App. at 17a. It is not reasonable to assume, as the PUC does, that courts in the Third Circuit will fail to follow that court's affirmation that "the PUC will remain free to relitigate [whether it is an "arm of the state" entitled to immunity] with anyone else who hauls it into federal court." *Id.* at 16a. Nothing in the Third Circuit's opinion will preclude the PUC from litigating the issue of its Eleventh Amendment immunity with parties other than Amtrak, *see*

United States v. Mendoza, 464 U.S. 154, 164 (1984), and the Commission makes no claim here that it cannot relitigate the issue with other parties.[9]

Second, the PUC is in essence seeking an advisory opinion from this Court, because the present case does not raise questions of offensive *non-mutual* collateral estoppel, as the Third Circuit recognized. Pet. App. at 7a ("This is a case of offensive *mutual* estoppel.") (emphasis added). Should a party attempt to make offensive use of the preclusive effect of the 1997 judgment, the PUC will be able to argue the fairness of preclusion in that particular case, if such a case ever arises. *See Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 331 (1979) (preferable approach to problems of offensive non-mutual collateral estoppel is "to grant trial courts broad discretion to determine when it should be applied").

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[9] The PUC contends that the Third Circuit's opinion creates a "Catch 22" for the Commission. Pet. at 21. The PUC asserts that this Court's statement in *Mendoza* that "the government is free to litigate that issue in the future with some other party," 464 U.S. at 164, may not apply to the PUC "if it is decided that the PA PUC is not an arm of the state[.]" Pet. at 21. The Commission does not explain why it would be prevented from relitigating this issue with parties other than Amtrak, and it is apparent that the PUC conflates two distinct concepts. The Commission may be a "governmental" entity without being an "arm of the state." Indeed, this Court's cases make clear that there exist entities which, while clearly "governmental," are simply not arms of the state. *See, e.g., Alden v. Maine,* 527 U.S. 706, 756 (1999) (immunity "does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the state"); *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979) (this "Court has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities 'exercise a slice of state power'").

IV. THE ISSUE OF THE PUC'S CLAIMED IMMUNITY WILL NOT "EVADE REVIEW" IF CERTIORARI IS DENIED.

In the event that the district court decides substantive issues in this case while this Petition is pending, the PUC contends that application of collateral estoppel to its argument that it is an "arm of the state" immune from suit by Amtrak [10] is subject to an exception to the mootness doctrine for issues that are "capable of repetition, yet evade review." The PUC's attempt to apply the principles of this exception to this case is unwarranted.

"The capable of repetition yet evading review rule is an extraordinary and narrow exception to the mootness doctrine," applied only in "extraordinary circumstances." *Minnesota Humane Society v. Clark*, 184 F.3d 795, 797 (8th Cir. 1999) (citations and quotations omitted). As reflected by the words of the exception, an issue must be likely to evade review to merit its application. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). Claims for which there is adequate time to litigate a claim fully, as is true for the underlying case, are unlikely to "evade review." *See id.* (noting that the exception requires that "the challenged action was in its duration too short to be fully litigated").

This case does not fall within the "capable of repetition, yet evading review" exception. Notably, the PUC fails to cite any authority applying that exception to the mootness doctrine to issue preclusion. Indeed, because the PUC's assertion of harm should this case "evade review" assumes the accuracy of the PUC's underlying claim of immunity

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[10] The PUC does not contend, nor can it, that it is precluded from litigating whether it is an "arm of the state" entitled to immunity from suit against any other party, save Amtrak. *See* Pet. App. at 16a (noting that the PUC remains free to relitigate whether it is an "arm of the state" entitled to immunity from suit against anyone but Amtrak).

in suits brought by Amtrak, the PUC turns the doctrine of issue preclusion on its head and ignores the purpose of that doctrine.

"A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies.'" *Montana*, 440 U.S. at 153 (quoting *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49 (1897)). Issue preclusion ensures that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involveing a party to the prior action." *Montana*, 440 U.S. at 153 (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979)).

The PUC was given a full and fair opportunity to establish that it is an "arm of the state" entitled to immunity from suit against Amtrak. If the PUC believed the district court's 1997 judgment that it is not an "arm of the state" and therefore does not enjoy Eleventh Amendment immunity in litigation against Amtrak was in error, the proper avenue was to appeal that judgment. The PUC did not do so. The PUC's repeated attempts to litigate an issue it lost against Amtrak in 1997 [11] eviscerate the central purposes of issue preclusion and Amtrak's right to repose. *See Montana*, 440 U.S. at 153-54 (the purpose of issue preclusion is to protect victorious parties "from the expense and vexation attending multiple lawsuits," to "conserve judicial resources," and to "foster[] reliance on

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[11] *See Southeastern Pennsylvania Trans. Auth. v. Pennsylvania Pub. Util. Comm'n*, 210 F. Supp. 2d 689, 715 (E.D. Pa. 2002) ("PUC's first argument, that it is an 'arm of the state' is a nonstarter. It has been rejected no fewer than four times in cases involving Amtrak and PUC.").

judicial action by minimizing the possibility of inconsistent decisions." Having lost its underlying claim of immunity against Amtrak, the basis for PUC's request for review is legally precluded. *See Stauffer*, 464 U.S. at 174 (applying collateral estoppel to preclude the government from relitigating a claim against the same party).

Even if the issue of whether the PUC is an "arm of the state" entitled to immunity "evades review" in this particular case, it will be a result of the PUC's failure to diligently pursue a stay of the underlying case and a swift resolution of its appeal of the application of collateral estoppel. *See In re Kulp Foundry*, 691 F.2d 1125, 1130 (3d Cir. 1982) ("Lack of prompt and diligent action in taking an appeal is also determinative of whether the case falls within the [capable of repetition, yet evading review] exception to the mootness doctrine"). In fact, the PUC did not seek to stay the substantive case in the district court for over a year and a half *after* that court denied the PUC's motion to dismiss on May 10, 2001. Only after the PUC lost its appeal in the Third Circuit on May 1, 2002 and then lost its request for rehearing *en banc* on November 22, 2002 did the PUC seek a limited stay of the issuance of the mandate by the Third Circuit.[12] That belated request by the PUC, however, only sought a stay of the issuance of the mandate until February 20, 2003, which was then denied. Moreover, after having delayed appeal to this Court by filing a motion for rehearing *en banc* in the Third Circuit rather than an immediate petition for a writ of certiorari, the PUC caused further delay by seeking an additional 30 days in which to file its Petition, thereby extending the time between the Third Circuit's denial of a rehearing and its filing of a petition to approximately four months. The PUC's lack of diligence in avoiding mootness is

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[12] The PUC cannot reasonably claim that the fact that the district court placed the merits of the case in abeyance pending resolution of issues subject to arbitration justifies its lack of diligence in this regard.

fatal to any attempt to avail itself of an exception thereto. *See New York City Employees' Retirement Sys. v. Dole Food Co., Inc.*, 969 F.2d 1430, 1435 (2d Cir. 1992) ("Where prompt application for a stay pending appeal can preserve an issue for appeal, the issue is not one that will evade review") (citation and quotation omitted); *Kulp*, 691 F.2d at 1130 ("If Kulp has acted quickly, this action would not be 'in its duration too short to be fully litigated prior to its cessation or expiration'") (citing *Illinois State Board of Elections v. Sociality Workers Party*, 440 U.S. 173, 187 (1979)).

CONCLUSION

The PUC's petition does not meet this Court's criteria for issuance of a writ of certiorari, and the petition should be denied on that ground alone. The PUC seeks review of questions neither presented to nor passed upon by the lower courts, and they are thus not properly before this Court. In addition, the PUC's claims amount, at most, to an assertion that the Third Circuit improperly applied a properly stated rule of law. Once again, such a claim does not satisfy this Court's criteria for issuance of a writ.

On the merits, the district court's and the Third Circuit's applications of the doctrine of issue preclusion to prevent the PUC from relitigating its claim to Eleventh Amendment immunity are completely consistent with this Court's precedents. The Third Circuit did not err in refusing to apply the "unmixed questions of law" exception to issue preclusion to this case because the PUC's claimed status as an "arm of the state" is not a pure question of law and because the two cases in which the Commission's claim for immunity arose are not "substantially unrelated" for purposes of the exception.

Accordingly, this Court should deny the PUC's petition for a writ of certiorari.

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No. 02-1402

Supreme Court, U.S.
FILED
MAY 6 2003
OFFICE OF THE CLERK

In the

Supreme Court of the United States

THE PENNSYLVANIA PUBLIC UTILITY COMMISSION: JOHN M. QUAIN, CHAIRMAN; ROBERT K. BLOOM, VICE CHAIRMAN; NORA MEAD BROWNELL, COMMISSIONER; AARON WILSON, JR., COMMISSIONER; TERRENCE J. FITZPATRICK, COMMISSIONER,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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PETITIONER'S REPLY MEMORANDUM

There is no precedent for applying the equitable doctrine of collateral estoppel to preclude the Eleventh Amendment defense of sovereign immunity where the denial of immunity occurred in a prior unrelated case based on the "burden of proof" test. Amtrak and the Third Circuit have cited none, because none exits. Precedent of this Court does exist, ruling that preclusion principles do not apply to a prior denial of immunity where, as in this case, judgment was rendered in favor of the party claiming the immunity[1]. *Mathias v. Worldcom Technologies*, Inc., 535 U.S. 682 (2002). Yet, contrary to *Mathias*, the Third Circuit rules that preclusion principles do apply to a prior denial of immunity where judgment was rendered in favor of the party raising the immunity[2].

Amtrak's Brief in Opposition in No. 02-1402, fails to even address the application of the rule in *Mathias* to the present case. Rather, Amtrak's arguments rest entirely upon cases such as *Montana v. United States*, 440 U.S. 147(1979), in which preclusion principles are found to be applicable based upon the government's voluntary participation in the prior litigation. (Brief in Opp., at 11) Thus, Amtrak's opposition is deficient in failing to overcome both: 1) the application of *Mathias;* and, 2) the material distinction between the present

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[1] In the prior litigation, Amtrak brought suit and the PA PUC raised the defense of sovereign immunity to defeat Amtrak's claim. The federal district court denied immunity, but, none the less, dismissed Amtrak's suit. (Pet. App. at 68a)

[2] The Third Circuit affirmed the district court's application of collateral estippel to bar the Eleventh Amendment defense of sovereign immunity based upon loss of that immunity in prior unrelated litigation for failure to carry burden of proof for entitlement to immunity. (Pet. App. at 18a)

case and those applying preclusion principles where loss of immunity turned on the government's voluntary participation in prior litigation.

Amtrak fails to overcome direct conflict between the Third Circuit's Order and this Court's jurisdictional ruling in *Mathias v. Worldcom Technologies, Inc.*

Amtrak purports to refute the PA PUC's position that the Third Circuit's holding is in direct conflict with precedent of this Court which sets the boundaries of the federal court's jurisdiction in the present case. Yet, Amtrak's opposition, however stated, serves to further illuminate for this Court the sum of the jurisdictional and constitutional principles which continue to elude Amtrak and the Third Circuit.

Amtrak's fundamental misapprehension of this case, shared by the Third Circuit, is illustrated by Amtrak's failure to recognize that the Third Circuit's Order is in direct conflict with this Court's unanimous jurisdictional holding in *Mathias v. Worldcom Technologies*, Inc. Amtrak deems *Mathias* worthy of only a foot note to dismiss. (Brief in Opp., p. 12, fn. 7)

In *Mathias*, this Court unanimously ordered dismissal, as improvidently granted, of an appeal by a state utility commission from the denial of the affirmative defense of sovereign immunity. After full briefing and oral argument, the reasons for dismissal were unanimously stated in this Court's order:

> [I]t is now clear that petitioners were the prevailing party below, and seek review of uncongenial findings not essential to the

> judgment and not binding upon them in future litigation. As a general rule, a party may not appeal from a favorable judgment simply to obtain review of findings it deems erroneous. *See, New York Telephone Company v. Maltbie*, 291 U.S. 645 (1934) (per curium)

Mathias v. Worldcom Technologies, Inc., 535 U.S. at 684.

Clearly, the jurisdictional ruling in *Mathias* treated the issues of "no right to appeal from a favorable ruling" and "preclusion of adverse determinations contained in a favorable ruling" as hand-in-hand from a jurisdictional standpoint. Thus, in *Mathias*, this Court's unanimous and unequivocal ruling is that:

> The denial of a state utility commission's immunity which occurred in a prior case resulting in judgment in favor of the commission ***is not*** *binding in future litigation.*

Contrary to *Mathias*, in the present case the Third Circuit's ruling is that:

> The denial of a state utility commission's immunity which occurred in a prior case resulting in judgment in favor of the commission ***is*** *binding in future litigation*

In the face of the direct conflict between *Mathias* and the Third Circuit's order, Amtrak notes of *Mathias*:

> That decision did nothing more than dismiss a writ of certiorari as improvidently granted and contains no analysis of the preclusion issue. In any event such a dismissal says nothing about the merits of the case. *Highs Tool Co. v. Trans World Airlines*, 409 U.S. 363, 366 n. 1(1973). Thus, contrary to PUC's assertion, there is no conflict between *Mathias* and the Third Circuit's decision in this case.
>
> (Brief in Opp., p. 12, fn. 7)

Amtrak's dismissive response to the unanimous pronouncement of this Court in *Mathias* is nothing short of astounding[3]. Amtrak's response and the Third Circuit's holding reflect their utter failure to grasp the fundamental constitutional principles which underpin

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[3] Amtrak's assertion that *Mathias* "did not discuss the preclusion issue" is indicative of Amtrak's the lack of awareness of *Mathias*' bearing on the present matter. Amtrak is simply incorrect. In *Mathias* this Court expressly stated that an appeal of the denial of immunity in a case in which the commission prevails is an appeal from a ruling which is "not binding in future litigation". *Mathias* at 684.

Amtrak and the Third Circuit are profoundly confused if it escapes their comprehension that "preclusion" is the synonymous with "binding in future litigation". To say a ruling is "not binding in future litigation" is another way of saying "will not be afforded preclusive effect."

This Court is of the unequivocal opinion that the denial of a state commission's defense of sovereign immunity in a case in which the commission prevails will **not** be afforded preclusive effect in subsequent cases. Yet, the Third Circuit has rendered a decision which does precisely that.

the holding in *Mathias*, regarding jurisdiction of the federal courts to hear appeals from and apply preclusion principles to adverse findings rendered against a party which prevails at judgment, the very principles which control the outcome of the present case [4].

Where this Court states specific reasons for the denial of Certiorari, in certain cases, the denial of Certiorari is a pronouncement of the Court's view on an important jurisdictional issue. *See, Parker v. Ellis*, 362 U.S. 574, 576 (1960) wherein Court observed that "[i]t is precisely because a denial of a petition for certiorari without more has no significance as a ruling that an explicit statement of the reasons for the denial means what it says."

It is without doubt that this Court's Order of dismissal in *Mathias* was a pronouncement of the Court's jurisdictional basis for dismissal. *Mathias* at 684. *See, Verizon Maryland, Inc., v. Public Service Commission of Maryland, and ,United States v. Public Service of Commission Maryland* , 534 U.S. 1072 (2002) (noting that Court may be unable to reach merits of the questions presented in *Mathias*), and, *Verizon Maryland, Inc., v. Public Service Commission of Maryland, and, United States v. Public Service of Commission Maryland, 535 U.S. 635, 642(2002)(*granting certiorari of issues " for reasons explained in our decision in *Mathias").* The Third Circuit and Amtrak fail to grasp the meaning of the

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[4] As noted in the Petition for Certiorari, the PA PUC notified the Third Circuit of the issuance of controlling authority by this Court, on the same day that *Mathias* was decided. Despite notice of *Mathias*, the Third Circuit declined, without giving its reason, to grant reargument to consider *Mathias*. Thus, we are required to guess the Third Circuit's basis for declining to apply *Mathias*.

reasons given in *Mathias*, as well as the relevance of that order to the present case.

The order in *Mathias* instructs as it applies the long standing rule of this Court that if the Article III jurisdictional powers of the federal court do not extend to the state commission's appeal from denial of immunity where judgment had been rendered in favor of the commission, on the basis that the immunity issue is "unnecessary to the judgment, " it follows, therefore, that the federal courts also lack authority to afford preclusive effect to the prior denial of immunity in subsequent cases since the required element for applying preclusion principles, that the ruling was "necessary to the judgment[5]" is not satisfied. *See*, *Cardinal Chemical Company* 508 U.S. 83 (1993) (discussing, within context of patent litigation, issues of mootness as precluding Article III power of the Court).

In *Mathias*, this Court found it could not reach the merits of any of the questions presented in the commission's appeal because the state commission did not have standing to seek the Court's review. Since the

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[5] The Third Circuit's basis for finding the denial of immunity "necessary to the judgment" was that denial of immunity was a threshold question to denial of the PA PUC's claim for relief pursuant to *Seminole Tribe v. Florida*, 517 U.S. 44(1996). (Pet. App. at 10a) The Third Circuit failed to perceive that *Seminole Tribe* is itself, relief associated with the claim of immunity – they are one in the same. The PA PUC's claim of the defense of sovereign immunity along with all its associated relief, does not transform the denial of immunity into a ruling "necessary to the judgment" rendered in favor of the PA PUC, dismissing Amtrak's suit. Further, it is absurd to suggest that the PA PUC's act of requesting the relief associated to its claim of sovereign immunity now serves to expose its claim of sovereign immunity to preclusion. If this were so, the PA PUC would occupy a better position, had it raised the defense but not requested the relief associated with it.

Court could not reach the merits of the appeal, certiorari was dismissed as improvidently granted. In the context of the dismissal for lack of jurisdiction, this Court unanimously stated that the subject of the questions presented by the commission, which included the denial of immunity, constituted appeal from findings "not necessary to the proceeding and not binding in future litigation." *Mathias* at 684.

Contrary to Amtrak's assertion that *Mathias* "contains no analysis of the preclusion issue" (Brief in Opp., at p. 12, fn. 7), it is evident this Court is of the opinion that preclusion principles does not apply to adverse determinations rendered in the context of a judgment in favor of that party.

Amtrak's offhanded rejection of genuine conflict between the Third Circuit's Order and *Mathias*, like the Third Circuit's refusal to reconsider its holding on the basis of *Mathias*, affirmatively demonstrates a profound misapprehension of the jurisdictional issue upon which this Court unanimously based *Mathias*.

Mathias directly controls the result in this present case, since it requires the holding that denial of the PA PUC's claim of sovereign immunity in the prior case in which judgment was rendered in favor of the PA PUC is not binding in the present and future cases brought by Amtrak. If *Mathias* "means what it says," the Order of the Third Circuit must be reversed[6].

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[6]The application of *Mathias* entirely refutes the remaining basis for opposition to the petition stated by Amtrak. Since *Mathias* controls the issue whether the denial of sovereign immunity was "necessary to judgment" the Third Circuit's basis for application of collateral estoppel and denial of the defense is jurisdictionally flawed. The application of *Stauffer* is unconstitutional and not a mere "misapplication of correctly stated legal principle" (Brief in Opp., at

Amtrak fails to reconcile the material distinction between the present case and those applying preclusion principles based upon government's voluntary participation in prior litigation

Amtrak's other points raised in opposition to the petition simply fail to accept that a material distinction exists between the present case and those cases applying preclusion principles, where denial of immunity was due to the government's voluntary participation in the prior litigation. (Brief in Opp., p. 11) *See e.g., Montana v. United States*, 440 U.S. 147(1979)(preclusion of constitutional claim that state taxing statute violated Supremacy Clause, based on fact that government had initiated and lost legal issue before state court, then sought to relitigate the issue before the federal court). Amtrak simply fails to perceive the relevance of this distinction.

Amtrak cites *Montana as* "flatly contradicting" the PA PUC's position. (Brief in Opp., at p. 11). To the contrary, the facts in *Montana* are so different from the facts presented in the present case; *Montana* illustrates the correctness of the PA PUC's position. First and foremost, *Montana* was a case in which the federal government was a claimant who had initiated suit. The government was found to have initiated litigation both in the state court and the federal court, which were an identical cause of action. The case was not a case of an "affirmative defense" with a burden of proof test associated with its entitlement. The constitutional claim was initiated by the government to overturn a state tax statute to avoid the costs associated with the tax.

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p. 13), because, as applied to the affirmative defense of sovereign immunity in this case, it exceeds the scope of the federal court's Article III power.

Montana was not a case where the government was claiming its immunity from suit in federal court. The constitutional claim in that case *was* necessary to the case because *it was in fact the merits of the case*[7].

In the present case it can not seriously be maintained that the defense of sovereign immunity is related in any way to the underlying suits repeatedly brought by Amtrak in federal court. It is because the defense of sovereign immunity is uniquely *un*related to judgment on the merits of *any* case that application of preclusion principles to bar the defense, under the facts presented in this case, is not authorized. *See, Mathias at 684.*

The Third Circuit's application of preclusion principles to the Eleventh Amendment defense of sovereign immunity based upon a prior denial for failure to carry the burden of proof, reduces the analysis of a constitutional right to "one strike you're out." The injustice of denial of the affirmative defense of Eleventh Amendment sovereign immunity without review is self evident.

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[7] Further, *Montana* serves to support the PA PUC's position that there must be a finding of waiver or voluntary consent to suit in the prior case, in order to appropriately apply the doctrine of collateral estoppel to the defense of sovereign immunity in a subsequent case. Amtrak argues that the PA PUC's position that such a finding is required, "seeks review of questions not presented". (Brief in Opp., at p. 8). Such a finding was never "at issue" in this case because the district and circuit courts failed to require it. The *Montana Court* viewed the government's voluntary participation as key to application of preclusion; the Third Circuit apparently does not. In *Montana* the view that the government had manned the "laboring oar" was pivotal to the application of preclusion principles. Thus, *Montana* is entirely consistent with the PA PUC's position.

In view of the Third Circuit's profound misapprehension of the jurisdictional principles which control the outcome of the present case, the Order of the Third Circuit which results in an unconstitutional deprivation of a state agency's right to raise the defense of sovereign immunity, and, the Third Circuit's Order in direct conflict with the controlling precedent of this Court in *Mathias*, the need for grant of review in this case is indisputable.

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